84-1764 (1)
Case No. _____

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CAFC No. 84-641

HUDBCA No. 79-421-C40

PAULINE WALBER, etc.

Appellant,

V.

THE UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
SAMUEL PIERCE, Secretary,

Appellee.

JURISDICTIONAL STATEMENT

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313-537-7800

Dated: February 9, 1985

77pp

STATEMENT OF ISSUES PRESENTED

1. Whether based on the fact that Appellant has exhausted all Administrative Relief available to her, entitles her to the Right to sue in the United States District Court, with Claims based on Sex Discrimination, by the Government.

2. Whether based on the fact that the Contracting Officer failed to inform Appellant of her Right to sue in the United States Claims Court, as provided with Standards set forth with CDA, would entitle Appellant to a New Trial.

3. Whether based on the fact that the Government was untruthfull with its Defense, before the HUDBCA, entitles Appellant to a New Trial.

4. Whether the United States Department of Justice has a Right to defend the Government, against the very same Prohibited Law, that it is supposed to protect the Public against, in this matter Sex Discrimination.

5. Whether the Court erred by considering Appellant's "Claim of Appeal by Trial De Novo", to be filed in the U. S. District Court, to be a Petition by Review, on the Decision entered by the HUDBCA.

6. Whether the Court erred in entering

its Decision to Affirm the Decision by the HUDBCA, in the form of Review, with the absence of the Record and Transcript, clearly not before the Court, to Review.

7. Whether the Court erred in failing to order the Transcript and Record from the HUDBCA, to Review, if it determined to construe Appellant's Claim of Appeal for a Trial De Novo, to be filed in the District Court, to be a Petition for Review of the Board's Decision.

8. Whether the Court erred in failing to inform Appellant, prior to entering its Decision to Affirm, that it determined to treat her Appeal for a New Trial in the District Court, to be a Petition for Review, thereby, depriving Appellant the opportunity to Amend her Pleadings, accordingly.

9. Whether the Court erred in failing to determine all the issues presented to the Court.

10. Whether the Court erred by issuing a Mandate July 31, 1984, on a Decision entered June 13, 1984, this post dates the Decision by fourty eight (48) days, and is contrary to FRAP Rule 41 (a), which provides that a mandate shall issue twenty one (21 days after entry of Order.

11. Whether the Court erred by failing to inform Appellant when and/or if it requested the Agency to transmit the Record.

12. Whether the Court erred with its determination that an oral argument is not required, without examining the Record, that clearly was not before the Court.

13. Whether the Court erred by Affirming the Board's Decision, claimed to be supported by substantial evidence, that was not before the Court to Review.

14. Whether the Court erred by basing its Decision solely on the "Brief for the Appellee" and the Decision by the Board, submitted by the Government with said Brief.

15. Whether the Court erred by determining that Appellant Appealed the Decision of the Contracting Officer, (which never existed), under the provisions of the Contract Disputes Act of 1978, (CDA).

16. Whether the Court erred by determining that "The Board held a hearing under proceedings applicable to the Act", with the absence of the Transcript.

17. Whether the Court erred in entering a Decision and Opinion on an issue clearly not before the Court.

18. Whether Disputes related to equal opportunity,,

are subject to Administrative Review and equitable adjustment.

19. Whether the Court erred by issuing a mandate on a Decision entered, without reviewing the Record, without oral argument, and, that was "not citable as precedent".

LIST OF PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WALBER CONSTRUCTION CO.

Appellant,

V.

THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SAMUEL PIERCE, Secretary

Appellee.

Pauline Walber D/B/A
Walber Construction Co.
Appellant,
In Pro Per

George M. Beasley, III
Commercial Litigation Branch
Civil Devision
United States Department of Justice
Washington, D.C. 20530
Phone: (202) 724-7237
Government Counsel

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IN THE

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Case No._____

CAFC No. 84-641

HUDBCA No. 79-421-C40

WALBER CONSTRUCTION CO.,

Appellant,

V.

THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT,.

Appellee.

JURISDICTIONAL STATEMENT

REFERENCE TO THE DECISION BY THE HUD BOARD OF CONTRACT APPEALS (HUDBCA)

This matter involves HUDBCA Docket No. 79-421-C40, Contract No. 044-78-4548, 15854 Asbury Park, Detroit, Michigan.

The Decision entered July 1, 1983, by the HUDBCA is signed by only two (2) Administrative Judges, pursuant to Rules of Procedure for said Board, an Order and/or Decision shall be signed by the three (3) Administrative Judges, on the Panel

This Appeal, braught by Pauline Walber, D/B/A Walber Construction Co., based upon the Government's refusal to satisfy Appellant's Claim, involving a Termination of Contract, was assigned by HUD to its own Board of Contract Appeals.

A Hearing in this matter was held April 28, 29 and 30, 1982, before the Honorable Jean S. Cooper, Administrative Judge, at the U. S. District Court, located in the U. S. Court House, 231 West Lafayette Street, Detroit, Michigan.

This Appeal was the first of Thirteen (13) Contracts, that the Government Terminated by Convenience, which Appellant claims were all Terminated in bad faith, by Breach of Contract, based on Discrimination, at a loss to the Government.

During 1978 and 1979, the U. S. Department of Housing and Urban Development, (HUD), had a program known as T.B.R. (To be repaired), whereby property was sold first, than Contract for Repairs was put out for Bidding.

During this period, Appellant was the successful Bidder and was awarded twenty seven (27) Contracts, which, excluding Amendments to Contracts, came to a total of $302,907.

Out of these twenty seven (27) Contracts, twenty three (23) Contracts were under Appeal, with the HUD Board of Contract Appeals.

These Appeals involved thirteen (13) Terminated Contracts, some with work well in progress and ten (10) were completed Contracts.

It is Appellant's contention that all Terminated Contracts, were Terminated based on Sex Discrimination.

Based on the fact that Appellant, the only Female Contractor on the Program, was the only Contractor, with as great a number of Terminated Contracts, not at all for the benefit of the Government, at a time when HUD was backlogged with work, and, all Contractors were saturated with more work than they could possibly handle to meet HUD time limits for completion dates, it well supports that the Termination of all Contracts, involved Discrimination.

George Day, acting C/O, advised at the beginning that a Contract Terminated for Convenience, can not be Appealed.

To clear this issue, with damages caused by thirteen (13) Terminated Contracts, Appellant's letter to Patricia Harris, Secretary, dated June 29, 1978,

requesting information as to how relief to same, can be sought, was received July 3, 1979, (Tab 6).

As a result of this, the Hon: B. Paul Cotter Jr., Administrative Judge, Chairman of the Board, assigned HUDBCA No. 70-421-C40, and, accepted Appellant's letter of inquiry, as a Notice of Appeal.

Said letter, at end of Page 1, states:

> "They were not canceled based on my quality of performance, they were canceled mainly due to Disputes over amounts allowed on Amendments, which I knew were far below, amounts allowed on same Items, to a Male Contractor."

This in itself indicated that Appellant, a Female, is basing Complaint on Sex Discrimination, therefore, Appeal should have never been assigned to HUDBCA.

Discrimination is prohibited by the Civil Rights Act of 1964, and, by Executive Order Number 11246.

Discrimination is a violation of a person's Constitutional Right, and, U. S. District Courts have original Jurisdiction from actions arising under Violation of a Constitutional Right, under 28 U.S.C. 1331.

The Dispute Clause included with this Contract covers only issues of fact, arising under the Contract, it does not include claims based on bad faith,

Breach of Contract, and, above all, Discrimination.

The abuse and Discrimination that the Government burdened Appellant with, was a Violation of her Constitutional Rights, this is excluded from Disputes Clause of Government Construction Contracts.

This is not within the scope of the Contract, such Claims are excluded from its coverage for the purposes of granting relief, are not subject to administrative review or resolution, such Claims are rightfully under the Jurisdiction of the United States District Court.

I. Government failed to Inform Appellant of her Rights under CDA

The Contract Disputes Act of 1978 (Public Law 95-563) became effective March 1, 1979. Appellant's Letter to Patricia Harris, that the Government decided to consider as a Notice of Appeal, is dated June 29, 1979. This indicates that at that time, even if the Government wished to process Appellant's Claims under Contract Disputes Clause, it had to be in accordance with CDA.

Among the four (4) standards set forth with CDA, the following is included:

> It must inform the Contractor of his (her) Rights, under "The Act", to obtain review by

an Agency Board of Contract Appeals or action can be taken directly in the U. S. Claims Court.

The Government failed to inform Appellant of her Right, in accordance with CDA.

It is Appellant's contention that the Decision by the Government not to inform Appellant of her Rights, was not an error, it was done willfully and deliberately.

Record files revealed a Document dated August 31, 1979, (Tab 9) (this postdates Appellant's letter of inquiry, dated 7-3-79), with regards to this Contract, which is a letter from Stephen W. Brown, Area Manager, HUD Area Office, Detroit, Michigan, addressed to Robert Brown, Chief Property Officer, informing him of a Contractor's Right, provided with the Contract Disputes Act of 1978, whereby he also states:

"Hence, the contractor's Appeal shall be processed in accordance with the Contract Disputes of 1978".

This instructions were completely ignored. With this the Government has unjustly burdened Appellant with an unjustified delay for the relief sought, financial damage, including the cost of this Appeal and undue emotional distress.

Nothing could possibly justify Government's failure to inform Appellant of her Rights in accordance

with "The Act".

This violated Appellant's Right to an Appeal, as provided by Law.

II. HUDBCA and the Government failed to follow Rules of Procedure for Boards of Contract Appeals

Rules of Procedure for Boards of Contract Appeals are Appellant's Right to an Appeal. With every Rule set forth in the "Final Uniform Rules of Procedure", that the Government failed to follow, Appellant's Rights were violated.

In accordance with Rule 4.(a)(c), the Contracting Officer's duty is to produce the Tabulated Record File, within thirty (30) days of receipt of Notice of Appeal.

The Government failed to follow this Rule.

The letter dated July 20, 1979, signed by Judge Cotter, assigning the Docket No., states:

> "The Government is directed to file the record described in Rule 4 with this Board 30 days after receipt of this letter."

The Government is in contempt of this ORDER.

The Government produced the Record File, the first day of the Hearing, April 28, 1982, almost three (3) years later.

The first day of the Hearing, until mid afternoon

was used up to straighten out and Tabulate the Rule 4 Record File, (see Appeal File Index of Documents).

This deprived Appellant the Right to supplement the Appeal File, as provided with Rule 4(b), in time of the Hearing.

This Rule allows Appellant thirty (30) days to supplement the Record File.

Appellant, within this time limit allowable, mailed to the Board of Contract Appeals, numerous Documents to supplement the Appeal File, said Documents were returned by Judge Cooper, stating that:

> "The record in the case was closed at the end of the Hearing."

To demand, against Appellant's objections, (by her Attorney), that the Hearing be conducted on the same day that the Record File was produced by the Government, in order to consider the Record Closed, is certainly a poor system of Justice, in a Federal Court.

It is Appellant's contention that the Hearing was not in the interest of Justice, to render an impartial Decision, it was purely to build a Defense for the Government, for future purpose, this is well supported now, with the Court's erroneous Decision to Affirm the Board's Decision.

III. The Government is in contempt of Orders issued by the Board, involving Discovery.

The Government failed to comply with the Decision entered by Judge Cotter, May 19, 1980, which involved the production of certain Cost Price Lists, prepared by Brothers Specifications Inc., (Brothers Inc.).

Judge Cooper issued an ORDER the 20th day of August 1981, which states:

> "The Government is in contempt of the order issued by the Board on May 19, 1980, directing the Government to provide such information.
>
> The Government shall produce all documents requested by Appellant in its applicable Motions to Compel Government Production of Documents.
>
> Production of all such requested documents to Appellant shall take place within 72 hours of receipt of this ORDER".

The Government is in contempt of this Order by failing to produce all documents as Ordered.

The "NOTICE OF HEARING", issued by Judge Cooper, scheduling the Hearing for April 28-30, 1982, states:

> "All discovery shall be completed by April 1, 1982."

The Government is in contempt of this ORDER by failing to produce all Documents as ORDERED.

A sworn Affidavit by George W. Day, acting C/O,

received by Appellant April 1, 1982, states that the Documents "are not available".

This Affidavit supports that the Government willfully and deliberately held back progress of this Appeal for almost three (3) years, to use the delay as a cover up, to avoid the production of Documents, most essential for Appellant to use as Proof of Evidence.

The Government claims that the Walk-through (W/T) Specification book, used the day of W/T, with reference to the initial Amendment, which indicates comments made by Appellant, Ralph Miller, a HUD Representative and the two (2) Representatives from Brothers Inc., present that day:

"The Area Office's Contracting Section, discarded".

This Spec Book is the most essential evidence for Appellant to prove that:

(a) There were to many Items questionable, involving the Specification Book, that Appellant Bid on.

(b) There were enough Items questionable as to whether or not the Government was to go ahead with any of the repairs.

(c) Involving all Items questionable, Appellant had to wait for a final Decision, in order to commence working.

(d) Never at any time was Appellant told, and/or

could have been able to commence work, involving this Contract, with the absence of a Decision from HUD.

IV. Government was untruthful with its Defense

A proper Cost Price List was essential for Appellant to carry the burden of proof that the demands made upon her, with the initial Amendment, was abusive and involved Sex Discrimination, whereby, due to failure to agree on the amounts allowed with Amendments to Contract, caused the Termination of the Contract.

The Government led the Board to believe that Brothers Inc., provided two (2) types of Cost Price Lists, one to be used for General Contracting, which allows 36% above cost for overhead and profit, and one Cost Price List used for Amendments, thereby claiming that the latter has a built in 18% above cost, for overhead and profit.

It is now well established that the Government willfully and deliberately misled the Board on this issue, to cover up the fact that amounts allowed on Amendments to Contract, for Appellant, were out of line and below amounts allowed to a Male Contractor, on same Items.

For further details on this issue, see Br. for Appellant 12-17.

In addition to this, Don Snyder the C/O who had this Contract Terminated, who was also Government's main Witness, with his Answers to Interrogatories, in the U. S. District Court, under Case No. 83-CV-0348-DT, (see enclosure A-Exh. #1), states:

25. Q. "Did Brothers Inc. provide a Cost Price List entitled "PRICE LIST (a) AMENDMENT COSTING?

A. I do not recall if that was the title used at any given time for the regular cost price list. There was only one type of cost price list regularly provided to HUD Contracting and it was for the purpose of providing a guide for amendments to contracts."(emphasis added)

Based on the fact that Government employees now for the first time admit that there was only one type of cost price list, provided by Brothers Inc., it would have to be a basic cost only, to the Government, excluding any amounts for overhead and profit, or else if they were using same Cost Price List as a guideline with Deletions to Contracts, the Government would be the loser, since Items covered by Contract, include 36% for overhead and profit.

To further support this, (see enclosure A-Exh. #2), Answer to Interrogatories by Don Snyder:

19. Q. "Why did you fail to inform Plaintiff that as calculated by Brothers Inc., she was entitled to 18% above cost, for overhead and profit, on amendments?

A. It was not the business of a HUD Contracting Officer to inform contrators that they were entitled to any particular percentage above cost for overhead and profit. It was rather the business of a contractor to convince the HUD Contracting Officer that the price sought for an amendment item was reasonable as covering its costs plus certain other negotiable monies. A contractor is not "entitled" to any set percentage above cost for overhead and profit. Many variables were used in determining amendment costs. Some of these were whether a tradesman would have to be specially called in or whether the amendment item would be done in conjunction with similar work already scheduled, what the overhead requirements of the contractor were (out of house or out of shop), what the time requirements were, as well as many other variables", (emphasis added).

Now then, if a Contractor is not "entitled" to "any set of percentage above cost for overhead and profit", the Government is not that generous nor waistfull, that it would include in its guideline, used to determine amounts to be allowed for Amendments to Contracts, an additional built in 18% for overhead and profit.

It can also be noted that Answers to Interrogatories by C/O Don Snyder, are in controversy with each other, and, he again continuous to be untruthfull.

IF A CONTRACTOR IS NOT ENTITLED TO ANY SET PERCENTAGE ABOVE COST FOR OVERHEAD AND PROFIT ON AMENDMENTS TO CONTRACTS, THE ONLY ONE TYPE OF COST PRICE LIST PROVIDED HUD, COULD NOT POSSIBLY HAVE A BUILT IN 18% FOR OVERHEAD AND PROFIT.

With Answers to Interrogatories Don Snyder states:

"I Don Snyder, declare under penalty of perjury that the foregoing answers are true and correct to the best of my knowledge" (emphasis added).

The fact that Don Snyder at Hearings before the HUDBCA, including this Hearing, was withholding vital information, willfully and deliberately misleading the Board, untruthful with his testimony, all of which clearly supports perjury, as a Government Witness, in a Federal Court, he is immune against punishment. This is well supported with other Claims by Appellant, in Federal Courts.

V. The HUDBCA erred in accepting and processing this Appeal

Appellant's letter dated June 29, 1979, addressed to Patricia Harris, Secretary at the U. S. Department of Housing and Urban Development, was simply to inquire how Claims involving Terminated Contracts can be processed, (see Tab 6 in HUD Record File).

The fact that the Board accepted said letter as a Notice of Appeal was erroneous and detrimental to

Appellant's Claim:

(a) At that point there was no Final Decision by the C/O.

(b) Based on the fact that the Board decided to accept said letter as a Notice of Appeal, it would have to be under Rule 1(b) of Rules of Procedure for Boards of Contract Appeals.

(c) Under this Rule, all Claims set forth with the Appeal, are under the Jurisdiction of the HUDBCA.

(d) The Board's Decision on Page 12 states:

"We have no jurisdiction to consider claims not presented to the Contracting Officer and denied by him."

It is Appellant's contention that the Board erred in Docketing this Appeal, in more ways than one:

(a) Tab 9 indicates that:

"Hence the contractor's appeal shall be processed in accordance with Contract Disputes Act of 1978".

(1) Based on the fact that a Decision by the C/O was not entered, it is Appellant's contention that the Board had an obligation, prior to Docketing said Appeal, to inform her of her Rights under CDA, which provides that she had the Right to sue directly in the U. S. Claims Court.

(2) The Board failed to do so.

(b) Appellant's letter clearly indicates that Discrimination was involved.

(1) Discrimination is not within the scope of the Contract, such Claims are not subject to administrative Review or Resolution. Under 28 U.S.C. 1331, the U. S. District Courts, have original jurisdiction on such Claims.

(2) Based on the fact that the Board did accept and Docketed this Claim, than, under Breach of Contract, Appellant was entitled to all her Claims, entered within six (6) years from the date of Termination of Contract.

This matter, before the HUDBCA, was processed and decided by "Heads I Win Tails you Lose".

Specifications for Government Contracts are a warranty of the work to be performed under the Contract. The Government had a duty to prepare adequate, complete and accurate specifications for this Contract.

The fact that the Government failed to do so, is not a just reason to Terminate a Contract, nor does it justify for the Government to refuse to satisfy Appellant's Claims, including compensation for the time and cost invested with this Contract, for start-up activities.

VI. Statement of Facts before the HUDBCA

The HUDBCA, without just cause allowed this Appeal to prolong for more than three (3) years.

It took the Board from April 28, 1982, the day of the Hearing, until July 1, 1983, a total of one year and two months to enter a Decision by only two (2) Administrative Judges, Denying all Claims.

This Appeal was Docketed July 29, 1979, this

indicates that Appellant has been on route, seeking relief, for more than five (5) years, which now the U. S. Court of Appeals for the Federal Circuit, without just cause, barred with its Decision issued as a Mandate, on an issue clearly not before the Court, in form of review, and, not processed as a Petition for Review.

This can not be considered in the interest of Justice.

The Termination of this Contract, for Convenience, is dated September 7, 1978, same month that Don Snyder recommended that Appellant be ruled as a non-responsible Contractor and one month prior to Appellant's Suspension, without due process of Law.

The Government, before the HUDBCA, claimed GENEROSITY, in Terminating Contract for Convenience rather than Default, and, at the same time, claimed to have discarded the W/T spec book, which was the basic evidence, essential for Appellant to prove that she was not to commence performance until final Decision by HUD.

This type of Government strategy, allowed by the HUDBCA, certainly lacks Justice in processing an Appeal.

The initial Amendment that the Government demanded to be prepared by Appellant, (see Tab 3-G), lists fourty two (42) Items, and there were numerous additional Items picked up at the W/T, that were noted in the W/T Spec. Book, which were to be determined at a later date.

Of all the Items listed with this Amendment, with the exception of Item 27, all others were omission in specs, as marked for "Justification" with letter "G".

This well supports that the Specifications for this Contract, were inadequate.

To demand that Appellant perform this much additional work at a loss and/or free of cost to the Government, in order to obtain City Certs, as specified in Contract, was abusive and Discriminating, this was never pulled on a Male Contractor, and, this does not justify a Termination of Contract.

CFR Title 41, 1-8.201, General (a) states:

> "Contracts shall be terminated for the convenience of the Government when it is determined that such action is in the best interest of the Government."

Appellant's Summary of Additional Cost to the Government, caused by the Termination of Appellant's Contract, was presented at the Hearing.

Judge Cooper refused to allow this Document to be entered as an Exhibit.

Said Document later sent by mail, should be in Record File and same supports that for just the additional cost of performance of the Contract, later performed by William Murray Inc., the rent arrearage waived for Lela Cade and the additional cost picked up with theft and vandalism, the Government picked up a loss of $2,752.24.

This amount was considerably increased with additional Holding Cost, City and County Tax, Utilities and cost for Area Management Broker, (AMB). Appellant can not prove these additional amounts in exact dollars and cents, due to the fact that, although previously requested by Appellant, the Government refused to produce these Documents.

These expenditures are a known fact to exist, which have been picked up by the Government as a result of Appellant's Termination of Contract.

With all these additional expenses, in addition to the Holding Cost that the Government picked up, with Lela Cade's (purchaser) involvement with Coyle property, as well as the Asbury Park property, that the C/O well knew, in advance, that the Government is

exposed to, it well supports that the Termination of this Contract was in bad faith, abusive and involved Sex Discrimination.

In addition, the Government did not have a well drafted Clause that would allow Termination for Convenience.

CFR 1-8.201 (b) states:

> "A well drafted termination for convenience clause defines the rights of the Government and of the contractor in a termination of the contract for the convenience of the Government and provides for the settlement of claims thereunder."

Same paragraph further indicates that the absence of a well drafted Termination for Convenience Clause, constitutes a Breach of Contract.

Same paragraph further states:

> "Such a breach of contract may subject the Government to liability for common-law damages, including anticipatory profits."

The Construction Contract, Standard Form 23, used with this Contract, which, among all other documents included with this Contract, is the true Contract, due to the fact that it bears the signature of both parties, the Government and the Contractor.

A Clause as serious as a Termination of Contract, must be well drafted, in plain view, and, bear

signatures of both parties, as acceptance.

The Government failed to do so.

The Government does not practice what it preaches.

The Government demands that every Contractor working on Government Projects, must have 20% of minority employees.

In all the years, since 1972, that Appellant has been involved with Government Construction Contracts, never has there been in HUD's Contracting Division, a Female or Minority Male Inspector nor a Construction Analyst.

This in itself supports Discrimination.

A change in this policy is essential, if the Government is to open the door for future Female and Minority Contcactors, and, give them an equal opportunity, to develop and grow.

Appellant, the only Female Contractor participating with Programs at HUD, is the only Contractor with thirteen (13) Terminated Contracts, with not one of them to have been in the best interest for the Government.

Appellant is the only Contractor, that, to keep from having more Contracts Terminated, was forced to

perform as much work on Amendments, without profit and/or at a loss, which are presently with complaints in various Federal Courts.

These clearly supports Discrimination.

In 1978, with the construction business Booming, including the thirteen (13) Terminated Contracts, Appellant was awarded Contracts that came to a total amount of $302,907.

The total of twenty three (23) Contracts involved with Appeals, supports that the Government was simply not going to allow a woman, earn that kind of money. John Jannetta, Don Snyder and for completion George Day, made certain of that.

Letter dated February 5, 1980, (see Court File A-Exh. "O"), from Peerless Insurance Co. signed by Dennis E. Scully, Bond Underwriter, addressed to Helen Steel, who issued Bonds for Appellant, supports the extenet without justification, that these men, carried their Act of Discrimination, by involving the Bonding Co., with Contract Disputes.

To the HUD Representative, handling an Amendment for Appellant, it was like a competative game, to beat her, to the fullest extent.

VII. Witnesses produced by the Government

The Government with their Witness List, stated:

"Regarding the Asbury Park contract, Mr. Jannetta or Mr. Snyder will testify about the circumstances which lead to the termination of this contract. Mr. Day or Mr. Beaupied will be called to explain the Department's decision regarding Appellant's termination claim."

The only two (2) Witnesses involved with the Amendment and W/T were Mr. Miller and John Jannetta. The Hearing was conducted in a manner where Mr. Miller was never produced as a Witness.

John Jannetta, who master-minded the cuts on the amount allowed for Amendments on page 1, and, entered all amounts allowed on page 2, who also denied many Items that were essential to bring property up to Code, that were originally approved by the men on the W/T, although listed, was not produced by the Government. These deprived Appellant of the opportunity to cross-examine and thereby clear the issue involving the unjustified demands he made upon her, with this Amendment, which led to the Termination of this Contract.

The Government produced as a Witness, Don Snyder, who had no connection at all with the W/T, who completely had refused to assist in the resolution of the

Dispute involving the Amendment, who knew little if anything about the Amendment, who in bad faith without just cause recommended that Appellant be ruled non-responsible, whereby he succeeded in having Apellant Suspended and by false information given as reference, caused Surety Co. to refuse to reinstate Appellant for Surety Bonding.

The Government produced George Day as a Witness.

Against Appellant's objection, T.12, by her Attorney, George Day was allowed to sit in, all through the Hearing, to assist Government Counsel. George Day who is also an Attorney, is the root of all problems with Appellant, that resulted in Appeals of such great multitude.

Based on the fact that George Day was listed to be a Government Witness, Judge Cooper erred by allowing him to sit in, all through the Hearing. There are many other employees at HUD, well capable, that could have assisted Government Counsel, if she was unable to conduct the Defense, on her own.

The Witnesses that, when cross-examined could have cleared the issue involving the unjustified demands made upon Appellant, which led to the Termination of the Contract, the Government conveniently

EDITOR'S NOTE

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did not produce at the Hearing.

This is commonly known as Government strategy.

VIII. Argument before the HUDBCA

Appellant's argument against using a Termination for Convenience, was not based on the fact that the Government did not make as much profit by "reprocurement of the rehabilitation work", it was based on the fact that Don Snyder, fully aware that Lela Cade, the Purchaser, had two (2) Government acquired properties tied up, while waiting for this property to be completed, that she was in arrear on her Rent on the Coyle property and failed to minimize the loss to the Government, which he could have, had he actually, in accordance with his duty as a C/O, checked with Cost Price List for amounts allowed, and, with the three (3) men present at the W/T, involving Items later denied by Jannetta.

The Termination of this Contract, with Lela Cade the Purchaser tying up two (2) Government acquired properties and in arrear in rent on the property she was living in, well indicated, at the time of Termination of Contract, that such action, will be at a loss to the Government.

CFR 1-8.301 (a) states:

"A settlement should compensate the contractor fairly for work done and the preparations made, for the terminated portions of the contract, including an allowance for profit thereon, which is reasonable under the circumstances. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The application of standards of business judgment, as distinguished from strict accounting principles, is the heart of a settlement." (emphasis added).

At the time this Contract was Terminated, all start-up activities, in accordance with HUD's regulations were completed. Under careful supervision all planning for proper repairs were completed, all negotiations with Subcontractors was completed, work schedules for all Subcontractors, in accordance with specifications, were completed arrangements for working capital was made, funds and time to perform was reserved for the performance of this Contract.

There is no just cause to deny Appellant compensation for all the time she devoted involving all these activities. The fact that Appellant did not have the need to draw a weekly salary, from the Company, does not justify to give the Government immunity from having to satisfy this Claim.

HUDBCA unjustly allowed this Appeal to prolong for approximately four (4) years, this can not justify

to label same, as an "instant case".

From the day that HUDBCA accepted and Docketed Appellant's letter to Patricia Harris, as a Notice of Appeal, until the day that Case is disposed of, the Government had an obligation to safekeep and preserve all Documents relevant to said Appeal, Documents requested by Appellant, upon receipt of Notice that an Appeal has been Docketed, Documents requested within reasonable time thereafter, and, Documents as ORDERED to be produced, by the HUDBCA.

This Contract is one of thirteen (13) that the Government Terminated, in a period of approximately five (5) months, this in itself, for the damage caused with each Contract, can not be considered "frivolous", add to this, the fact that the Government without just cause, caused the Termination of Appellant's open line for Surety Bonding, which completely put Appellant out of Business, based on the fact that no Contractor can operate without Surety Bonding, plus the fact that the Government without due process of Law and without just cause, Suspended Appellant from participation with HUD Programs, that the Board ruled to be erroneous and ORDERED the Government to reinstate Appellant, of which the

Government remains to be in contempt, it well supports that the Termination of this Contract was a "one package deal", involving Sex Discrmination, which is prohibited by Law and can not be considered "frivolous"

Considering all that is in the Record File, including the Docu ents that Judge Cooper unjustly refused to allow to supplement the Rule 4 File with Tabs 8, 9 and 12 through and including Tab 24, plus "Appellant's Post-hearing Brief", with Documents in support thereof, that Judge Cooper refused to allow as Exhibits, plus presentation of Appellant's Case at the Hearing, that was continuously interrupted in order to screen as to what will be allowed to go on Record with Transcript, the Decision by the Board is misrepresented in order to Grant the Government the Right to a Termination for Convenience.

The Decision to Grant the Government the Right to this Termination for Convenience, clearly indicates that basic facts, with Documentation in Support thereof, was "swept under the carpet" in order to make such an erroneous Decision.

The Government sets forth many provisions, in many ways, to protect the Contractor, all of which

are completely without any benefit when relief is sought in Federal Courts, based on the fact that the Government, on the other hand against its own Ruling, protects and Grants immunity to its Employees against perjury and/or any kind of wrong doings.

The Contract herewith involved was awarded to Appellant by C/O Don Snyder, and, following his instructions was Terminated by Theresa E. Dziekan, (Tab 2 & Tab 4).

With every Hearing before the HUDBCA, in 1982, to support Government's Claim that the Cost Price List produced by the Government had a built in 18% on Amendments, above cost, for overhead and profit, claimed that the Cost Price used for General Contracting, that could have been used for comparison, had been destroyed and was no longer available.

Michael Davio, a Government Witness from Brothers Inc., testified that he recognized the Cost Price List presented to him for Identification, to definitely be the Cost Price list used for Amendments and not the one used for General Contracting, whereby the Government supported its Defense, that said Cost Price List, had an 18% built in for overhead and Profit, (T.342-348).

To further support this, (see CF A-Exh. "Q") which is T.31 (4-30-82)HUDBCA 80-465-C5, Cak Drive, Contract No. 044-78-4598, whereby it states:

"MR. GREENFIELD: As I understood the testimony yesterday there are two separate books, One is the Government cost --

JUDGE COOPER: But we're not talking about that. She doesn"t have the Government cost Book. She's got the amendment price book there. That was testified to now and we know what those exhibits are. They included the 18 percent."

We now know, by Don Snyder's own admission, that the Government could not produce, what never existed, but;

Involving all of the Hearings before the HUDBCA, including this Appeal, the Government built an Iron Shield around its Witnesses, to protect them from Legal Punishment, involving Perjury.

Taking this in consideration, including the fact that the Government is in contempt of all the ORDERS issued by the Board involving Documents requested, that the Government failed to produce, there was no way that Appellant could have carried the burden of proof, when this Appeal was before the HUDBCA.

STATEMENT OF GROUNDS FOR JURISDICTION BY THE SUPREME COURT FOR THE UNITED STATES

As a total Appellant had twenty three (23)

Contracts on Appeal with the HUDBCA, that date back to 1979, some of which continue to be there, all by a very slow process.

In 1982, the HUDBCA, led by Administrative Judge Cooper, began to "Boom, Boom, Boom" Hearings, (these were her words) but, was and continuous to be slow in entering Decisions, thereby depriving Appellant the Right to start action, in a Federal Court with proper Jurisdiction, if it should so be indicated.

It is well supported that the sudden rush to process Hearings, but not Decisions, was to build a Defense for the Government, which-ever way possible, based on the fact that to the Board (not Appellant), at that time, it became known that where the Contractor was not informed of his (her) Rights under CDA, the Higher Courts were ruling in favor of the Contractor.

In addition, never at any time did the HUDBCA inform Appellant of her Right to sue after Administrative Relief was exhausted.

After the Notice of Appeal was filed in the CAFC, including Appellants Brief on Claim of Appeal by Trial De Novo, did Appellant learn that there was no need to do so.

In accordance with Court Procedure, a Contractor shall first exhaust the Administrative Relief available, and, when the Decision and/or ORDER is entered, only if an Appeal by Review is desired, it shall be taken to a Court of Appeals, within 120 days from the date the Decision and/or ORDER is served.

When a new Trial is desired, a Contractor has six (6) years from the date the Administrative Decision and/or ORDER is served, to commence action either in the U. S. Claims Court or the U. S. District Court.

Accordingly, it appears to be, that Appellant erred in filing her Claim of Appeal by Trial De Novo with the CAFC, based on the fact that the six (6) year period had not expired, and she had exhausted all Administrative Relief that was available to her, involving Discrimination, Appellant has a Right to start action in the U. S. District Court, which without just cause and processed contrary to Law, involving Appeals by Review, the CAFC has now barred with its Judgment, issued out of time as a Mandate, July 31, 1984, Affirming the erroneous Decision entered by the HUDBCA, Denying Appellant's Claim.

(i) Nature of Proceedings

The caption for the Brief of the Appellant reads:

"Appellant's Brief on the Claim of Appeal by Trial De Novo"

With said Breif, received by the Court January 26, 1984, including fifty (50) pages produced by photostatic process, Appellant sets forth reason and grounds for a Trial De Novo.

To further support this, see Br. 5-17, 24-32, 34-39 and 42-50.

For the relief sought, Appellant prays that the Court will:

"Grant this Claim of Appeal by Trial De Novo, to be filed in the United States District Court for the Eastern District of Michigan."

The Relief sought in the "Reply Brief for the Appellant, states:

"For all the reasons set forth with Appellant's Brief, with Documentation in support thereof and Appellant's Reply to Brief for Appellee, the Court should transfer this Case to the United States District Court, Eastern District of Michigan, Southern Division, or, Grant such relief as is necessary to commence action in said Court, involving this matter."

Never at any time did Appellant Petition the Court for a Ruling by Review on the Decision entered by the HUDBCA the 1st day of July 1983.

Letter dated January 31, 1984, signed by Clerk

George E. Hutchinson, states:

> "Receipt is acknowledged of 4 copies of appellant's brief on appeal in this case. Inasmuch as the brief was not in conformity with certain Court Rules such as the format, cover, and number of copies, the Court sua sponte has decided to waive these Rule requirements and accept the brief as timely filed on this date."

These facts support that the belated Mandate issued by the Court is on an issue clearly not before the Court to consider, Affirm or Deny, and, the fact that the Court decided to waive Rules of Requirements for a "Brief for the Appellant" and accepted Appellant's Brief, supports that the Court failed to Rule on all the issues that were before the Court, as later listed with Appellant's Motion for Reconsideration, Pages 3-5, in Statement of issues presented, which for the most, clearly indicate the page number as presented in Brief.

STATUTORY BASIS

The Statutory Basis that Appellant relies upon for the Jurisdiction of this Honorable Court are: 28 U.S.C. 1252 and 28 U.S.C. 2106.

(ii) ENTRY OF JUDGMENT

The Order Denying Appellant's Motion to Vacate the Mandate, issued July 31, 1984, and the Order Denying Appellant's Motion for leave to file out of

time a Motion for Reconsideration of the Decision and Opinion dated June 13, 1984, were both entered October 4, 1984.

The Notice of Appeal was sent to the CAFC by Certified Mail and Return Receipt Requested, October 27, 1983, same was received in said Court, October 31, 1983.

Appellant's Brief on Claim of Appeal by Trial De Novo, seeking the Right to start action in the U. S. District Court for the Eastern Districet of Michigan, was received in the CAFC, January 26, 1984.

The Reply Brief for the Appellant, requesting such relief as is necessary to commence action in the District Court, was received in the CAFC, May 1, 1984.

The Court's Decision and Opinion Affirming the Decision by the HUDBCA, on an issue clearly not before the Court to consider, was entered June 13, 1984, but the Mandate was not issued until fourty eight (48) days later.

Pursuant to FRAP Rule 41 (a):

> "The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order."

There was no such Order issued by the Court.

Appellant's Motion for Reconsideration was received in the CAFC August 2, 1984, this is within proper time limit from the date the Mandate was issued.

The Clerk of the Court informed Appellant, by phone, that using the date of June 13, 1984, the date that the Decision was entered, the Motion for Reconsideration can not be accepted as being timely filed.

Appellant's Motion to Vacate Mandate, with Brief in support thereof, was received in the CAFC, August 8, 1984, and;

Appellant's Motion for leave to file out of time, Motion for Reconsideration, which in a true sense was not necessary, since said Motion, totally related to the Court's belated Mandate, was filed within proper time limit of issuing date, was also received in the CAFC, August 8, 1984.

Upon receipt of letter dated October 4, 1984, signed by Clerk Hutchinson, informing that both Motions have been Denied, Appellant placed a Telephone call to the Clerk, requesting Official Orders that can be Appealed.

With letter dated October 12, 1984, signed by Clerk Hutchinson, received by Appellant October 17, 1984, the ORDER Denying the Motion of Appellant to

vacate the mandate, issued July 31, 1984, was enclosed, an Officail ORDER by the Court Denying Motion of Appellant for leave to file out of time the Motion for Reconsideration, was never transmitted to Appellant.

(iii) STATUTORY PROVISION

Title 28 U.S.C. 1252 provides that any party may appeal to the Supreme Court from an Order of any Court of the United States, in any civil action to which the United States or any of its agencies, is a party.

Title 28 U.S.C. 2106, provides that the Supreme Court:

> "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

The Appeal to the CAFC for the Right to sue in the U. S. District Court, was a harmless error, it does not justify for the Court to take advantage of that error, by barring Appellant's Right to sue in the District Court, with its Mandate, Affirming the Decision by the HUDBCA, an issue clearly not before the Court.

In addition, the Court's failure to determine the issues presented, well supports that had the Court determined said issues, with justice, it could in no way Affirm the erroneous Decision entered by the HUDBCA.

CONSTITUTIONAL PROVISIONS VIOLATED BY THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

With every Contract awarded Appellant, HUD included a Poster with instructions that same shall be posted on the Project, in plain view, at all times during performance of Contract, (see CF A-Exh. "S").

Said Poster informs that:

"EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW
DISCRIMINATION IS PROHIBITED"

Said Poster does not distinguish to be a protection against Discrimination for Appellant's Employees and/or Subcontractors, only.

For all the seven (7) years that Appellant participated with HUD Programs, including her previous complaints within the Agency and Appeals before the HUDBCA that involved Discrimination, never at any time, did the Government inform Appellant that she, as a Federal Government Contractor, is not protected against Discrimination by Federal Contracting Authorities.

HUD's failure to grant same protection against Sex Discrimination to the Contractor (Appellant) as to the men, that by her efforts are given the opportunity to participate with same, violates her Constitutional Rights, which provides, above all, that all people are to be treated as equal.

Same Law that protects Appellant's Employees and/or Subcontractors against Discrimination must also protect her, the General Contractor, otherwise the purpose for Title VII of the Civil Rights Act of 1964, Administered by the Equal Employment Opportunity Commission and the Executive Order Number 11246, as amended by Executive Order Number 11375, Administered by the Office of Federal Contract Complieance, would be defeated.

The fact that there may not be statutes to cite as of yet, that would assist Appellant with the relief sought, involving Sex Discrimination against a Government Contractor, does not justify the abuse and Discrimination that Appellant was burdened with, by Don Snyder, John Jannetta to whom happiness was, with reference to Amendments, to be able to gloat by saying "I beat the hell out of you" and George Day, whose pet phrase was "I can do anything I want to do".

There always has to be a first one.

Appellant is the first and only woman that participated with HUD Programs as a General Contractor for seven (7) years, one other woman tried it and was able to survive less than one year, before she had to give it up and become a Real Estate Broker.

There are a great number of women presently training in fields that through the ages, in the passed, was considered for men only, that may at one time or another, also participate with Government Contracts.

A new Law, recently enacted provides that 5% of Contracts involving Government funded Projects, shall be awarded to Female Contractors.

The Government is the people and all people shall be treated as equal. This is Appellant's Constitutional Right, that was violated by the Government.

There is no other Law, to be used in any Federal Court, that could possibly provide the Government with a Legal Crutch to lean on, in order to claim sovereign immunity, against Discrimination, by a Government Agency.

Title VI of the Civil Rights Act of 1964, P.L 88-352 and the United States Department of Justice Regulation, 28 CFR Part 42, prohibits Discrimination

because of Race, Color, Religion, Sex or National Origin.

The fair Labor Standards Act of 1938, as amended, prohibits Discrimination on the basis of Sex.

CFR 1-12.801(b) states:

"The regulations of the Secretary of Labor apply to all contracting agencies of the Government and to Contractors and subcontractors who perform under Government Contracts", (emphasis added).

Provisions set forth with the Equal Employment Opportunity, the Executive Order No. 11246 of September 24, 1965 and the rules and regulations of the Secretary of Labor, shall be employed by agencies with respect to Government Contracts and subcontracts.

With respect to Government Contracts and/or Government funded Contracts, the Law requires that Bidders shall be informed of his (her) Rights, against Discrimination, (see CF A-Exh. "A").

This Document is a "SPECIAL NOTICE TO BIDDERS", used by the State of Michigan and City of Detroit, which is included with Bid Packages, involving Government funded projects, informing the Contractor of his (her) Rights and duties, whereby it states:

"The Contractor recognizes the right of the United States and the State of Michigan to seek judicial enforcement of the foregoing covenants against

discrimination against itself or its subcontractors," (emphasis added).

This, the U. S. Department of Housing and Urban Development, a Government Agency, failed to inform Appellant, with this Contract and all other Contracts, presently in Litigation.

CFR 1-12.805-10, Disputed matters related to the equal opportunity program, states:

> "Disputes related to matters pertaining to the equal opportunity program shall be handled pursuant to the provisions of the Equal Opportunity clause in Government contracts, agreements and subcontracts, rather than the Disputes clause contained therein."

Claims based on Discrimination are not subject to Administrative Review for Resolution, this in itself, supports that the Court's Mandate, affirming the Decision entered by the HUDBCA, was erroneous.

STATEMENT OF THE CASE

This matter after being with the HUDBCA since 1979, in March of 1982, Judge Cooper, entered the Notice of Hearing, scheduling same for April 28-30, 1982, whereby it states:

> "All discovery shall be completed by April 1, 1982. The Government shall provide Appellant with all remaining documents ordered to be produced by that date."

The Government waited until the beginning of

pril of 1982, to file its Affidavit by George W. ay, signed under oath the 16th day of December, 981, indicating that the Documents requested, ssential for Appellant to carry the burden of roof, have been destroyed, (see CF A-Exh. "H").

It can well be noted that Item 1 of said Affi- avit is false, since we now have evidence that "cost rice lists used to estimate rehabilitation costs", ever existed.

Prior to scheduled Hearing, Counsel for Ap- ellant filed with the HUDBCA, a Motion for Ad- ournment, (see enclosure A-Exh. #3).

Said Motion was denied, T.6 (4-28-82).

Claims based on Discrimination are a violation f a parties Constitutional Rights.

Title 28 U.S.C. 1331, provides that the U. S. istrict Courts shall have original jurisdiction of ll civil actions arising under the Constitution, aws, or treaties of the United States.

In addition based on the fact that the C/O and he Board had failed to inform Appellant of her Right nder CDA, to start action in the U.S. Claims Court, ather than Appealing to the HUDBCA, there was the ossibility that this matter could have been

withdrawn from the HUDBCA and, an action started in a Federal Court, with proper Jurisdiction.

To determine which way to go with this matter, including as to which Court has proper jurisdiction of same, Counsel for Appellant did need sufficient time to adequately research the substantive law involved, that the Administrative Judge, fully aware that the Government was in contempt of all the Orders issued by the Board, involving Discovery, erroneously refused to allow.

Notwithstanding the fact that the Administrative Judge refused to allow Appellant's Counsel, an additional two or three weeks to research the law, mainly for jurisdiction, involving this matter, it took the Board one year and two months to enter its Decision, signed by only two (2) Administrative Judges, rather than the three (3), as provided with Rules of Procedure.

Said Decision indicates that Administrative Judge Edward Terhune Miller did not participate in this Decision.

This in no way can be considered in the Interest of Justice. This well supports building a Defense for the Government by the HUDBCA, which was later

erroneously Affirmed by the CAFC, not processed in the form of Review, but, issued as a Mandate, thereby, depriving Appellant the Right to sue the Government for the abuse and Discrimination that Appellant was burdened with, by the Government.

At the time the Decision by the HUDBCA, Denying the Claim in this matter, was served upon Appellant, she was not aware that having exhausted Administra-- tive Relief, she had the Right to start action against HUD in the U. S. District Court.

The Notice of Appeal received in the CAFC, October 31, 1983, in no way indicates to be a "Petition for Review", as provided with CAFC Rule. 10(c)(1).

With the letter dated October 31, 1983, signed by Clerk Hutchinson, addressed to the Board of Contract Appeals, by using a ready printed form, it erroneously informed the Board that:

> "This is to acknowledge receipt on October 31, 1983 of a petition for review, copy attached, of a decision of your agency." (emphasis added). (see enclosure A-Exh. #4).

Notwithstanding the fact that the Brief is captioned "Appellant's Brief on Claim of Appeal by Trial De Novo" and with the relief sought Appellant prays that the Court will "Grant this Claim of Appeal by Trial De Novo, to be filed in the United States

District Court for the Eastern District of Michigan", this error, by using the form letter, opened a door for the Government to construe the Appeal to the CAFC, to be a "Petition for Review".

The Government with its "Brief for the Appellee", by lack of any other Defense, conveniently, all the way through, construed the Appeal for the Right to a new Trial, to be a Petition for Review.

Reply Brief for the Appellant, Pages 9-14 and on Page 18, Appellant clearly states that she is not asking the Court to "Overturn the Board's Rejection".

Appellant clearly states:

> "With this Appeal Appellant is asking for the Right to commence action in the United States District Court, by Trial De Novo, which Appellant was not aware, at the time this Appeal was filed, that she had that Right, without Appealing for Leave to do so, when Administrative Relief was exhausted, the day that the Board's Decision was served upon her.

For the Relief sought, Appellant states:

> "For all the reasons set forth with Appellant's Brief, with Documentation in support thereof and Appellant's Reply to Brief for Appellee, the Court should transfer this Case to the United States District Court, Eastern District of Michigan, Southern Division, or, Grant such relief as is necessary to commence action in said Court, involving this matter.

All these was completely overlooked by the Court and without just cause, the Court Affirmed the Board's

Decision, and, fourty eight (48) days later, issued the Mandate, thereby, granting the Government immunity against being sued in the District Court, but;

Based on the fact that the Court decided to take advantage of Appellant's error, in Appealing to the Court for a Right that was hers to begin with, by construing said Appeal to be a Petition for Review, the Court erred by failing to process same, accordingly.

This Appeal clearly was not processed in the form of a Petition for Review, there was no Transcript nor Record before the Court, for the Court to Review.

PROCEEDINGS IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Pursuant to CAFC Rule 11(b)(2), the Clerk of the Court shall enter the Appeal on the Docket upon receipt of the certified list required by Rule 10(c)(2) and Rule 10(c)(3).

This would be the Certified Copy of Docket Entries in the HUDBCA, up to and including the Notice of Appeal.

A copy of this Document was never submitted to Appellant by either the HUDBCA nor the Court.

This deprived Appellant of the information as to what Documents the Board listed with its Certified Copy of the Docket Entries.

As indicated with Br.8-9, there was a Dispute involving numerous Documents to supplement the Appeal File, (Rule 4 Record File), given to Appellant the day of the Hearing and the Administrative Judge closed the Record File on same day, thereby denying Appellant the Right to supplement the Record File, as provided with Rule 4(b) of Rules of Procedure for Boards of Contract Appeals.

Based on the fact that the Court decided to treat Appellant's Claim of Appeal for the Right to a New Trial, as a Petition for Review, then, Appellant was entitled to a copy of the Certified Docket Sheet, indicating which of the Documents, listed therewith, was included.

Letter dated November 25, 1983, signed by Clerk Hutchinson, states:

> "This is to advise that the above entitled appeal has been docketed in this court and given the indicated case number and filed date. CAFC Rule 11(b)(2)."

Same letter further states:

> "Should it be necessary to order the record, this office will request the agency to transmit the record promptly and so advise you." (emph. add.)

Appellant was never informed of the Court ever requesting the Record nor a date of receipt of said Record.

Pursuant to FRAP Rule 10(a), the Record on Appeal consists of the original papers and Exhibits, including the Transcript.

FRAP Rule 34(a) provides:

"Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of briefs and record, shall be unanimously of the opinion that oral argument is not needed", (emphasis added).

Letter dated April 9, 1984, signed by Clerk Hutchinson, states:

"A review of this case indicates that oral argument is not required and that the appeal may be decided on the briefs without prejudice to full consideration of the issues." (emphasis added).

The Court's Decision states:

"The decision of the Department of Housing and Urban Development Board of Contract Appeals (the Board) denying Appellant's claims against the government in connection with the termination for convenience by a contracting officer of a contract for repair of HUD owned property is supported by substantial evidence and is affirmed". (emphasis added).

All these clearly supports:

a) That Appellant's Appeal for the Right to a New Trial, whether by purpose or error, was misinterpreted to be a "Petition for Review".

b) That Appellant's "Claim of Appeal by Trial De

Novo", was not processed in accordance with provisions set forth with Court Rules, to process a "Petition for Review".

(c) That the Court did not give full consideration to all of the issues before the Court, as presented by Appellant.

(d) That the Court denied Appellant the Right to examine the "Certified copy of Docket Entries".

(e) That the Court did not have in its possession the Record File, from the HUDBCA.

(f) That the Court determined that an oral argument is not required, without examining the Record.

(g) That the Court's Decision to Affirm the Decision by the HUDBCA, which it claims "is supported by substantial evidence", was actually based on the Board's Decision only, since the Record was never transmitted to the Court.

The Court's Decision further states:

"The findings of the Board are supported by substantial evidence, and its decision is correct as a matter of law and is affirmed."

This supports that the Court is simply assuming that the Board's Decision is "supported by substantial evidence", since it did not examine a Record that was not transmitted to the Court, which actually was a Record lacking evidence, that the Government failed to produce, as Ordered by the Board.

The Decision by the Court entered June 13, 1984, includes a Note on the top of the first page, whereby it states:

"This opinion will not be published in a

printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The Decision will appear in tables published periodically." (emphasis added),

This did not stop the Government from using this Decision as a precedent with Cases that were in the U. S. Claims Court.

Although the Lower Courts do not have to consider this Decision as a precedent, coming from the CAFC, it unjustly, and, without just cause, provides the Government with a Legal Tool, to serve as a "Power of Suggestion", in the Lower Courts, involving other claims against HUD that Appellant presently has in Federal Courts.

STATEMENT OF FACTS INCLUDED WITH THE COURT"S OPINION

The Court with its Opinion sets forth issues that clearly support to have been based solely on the "Brief for the Appellee" and the Decision by the Board without considering issues set forth with "Appellant's Brief on Claim of Appeal by Trial De Novo" and "Reply Brief for the Appellant".

The Court's Opinion does not make any reference what-so-ever to pages in the Transcript nor to Documents in Record File.

This well supports that the Transcript and the Record File, were never transmitted to the Court, for the Court to Review.

Even if the Court found reason to process Appellant's Appeal for the Right to a New Trial, as an Appeal in the form of Review, its Decision and Opinion would have to be based on the Record File and the Transcript, which clearly were not before the Court, to support this:

The Court with its Opinion states:

"Walber appealed the decision of the contracting officer to the Board under the provisions of the Contract Disputes Act of 1978."

This is misrepresented:

(a) There never was a "decision of the contracting officer" to Appeal. The Board decided to treat, as a Notice of Appeal, Appellant's letter addressed to Patricia Harris, inquiring how to process Claims involving Terminated Contracts.

(1) Said letter clearly indicates that claims are based on Sex Discrimination (Tab 6).

(b) The Record File supports that Appellant was never informed of her Right to sue in the U. S. Claims Court, as provided with standards set forth with CDA.

(c) Appellant could have never Appealed a Decision that did not exist, under provisions of CDA, that she did not even know, existed.

(d) Tab 9 in Record File, supports that the Government deliberately ignored instructions by Robert

Brown to process this Appeal under CDA, and, accepted Appellant's letter of inquiry as a Notice of Appeal, to retain this Claim, within the Agency.

(e) There is nothing on Record to support that Appellant "elected" to appeal to the Board, "under provisions" of CDA.

The Court's Opinion further states:

"the contracting officer denied the claim in its entirety on September 25, 1979."

(a) This postdates the letter addressed to Patricia Harris, dated June 29, 1979, that the Board decided to treat as a Notice of Appeal, again, to keep Claim within the Agency.

(b) A response Letter is not considered as a Final Decision.

(c) The Contracting Officer's letter does not meet standards to be a Final Decision.

The Court's Opinion further states:

"The Board held a hearing under proceedings applicable to the Act".

(a) Just because the Board had no Jurisdiction, other than under CDA, to consider the nature of Appellant's Breach of Contract, based on Sex Discrimination, did not justify for the Government to retain this Claim within the Agency, (see Br. by Appellee, Page 3).

The Court's Opinion further states:

"At the hearing Walber contended that the termination was not for the convenience of the government but was made in bad faith to injure her. The Board found that the contracting officer did not act in bad faith when he terminated the contract and that, in fact, he could have terminated it for default because Walber had done no work nor expended any funds whatever on the

contract. Such a default termination would have been detrimental to Walber with regard to her relationship with her surety (she had other contracts in progress). Therefore, the convenience termination was favorable to Walber."

(a) The Board's Decision that the Contracting Officer did not act in bad faith, was based on his testimony under oath.

(1) This is the same C/O who, to support Government's Defense that the Cost Price List sumitted had a built in 18% for overhead and profit, led the Board to believe that Brothers Inc. provided the Contracting Department with two (2) types of Cost Price Lists, one used for General Contracting and one used for Amendments, (see CF A-Exh. "B").

(2) Same C/O, with Answers to Interrogatories in the U. S. District Court, where he might be punished for perjury, obviously had second thoughts about being untruthful, and, thereby indicates that there was only one type of Cost Price List regularly provided to HUD, by Brothers Inc., (see CF A-Exh. "R").

(3) The fact that there was only one type of Cost Price List, that was withheld from the Board, supports Appellant's Argument that said Cost Price List was a Basic cost to the Government, with nothing added on, whereby, when used for Amendments, if for additions to Contract, 18% would be added on for overhead and profit, and when used for deletions, an additional 36% above that figure, would be deleted from Contract.

(4) This was a major issue for Appellant to carry the burden of proof, that the C/O's demand with amounts allowed on Amendments, in Dispute, was abusive and Discriminating.

(b) This is the same C/O that without just cause recommended that Appellant be ruled a non-responsible Contractor, whereby, Appellant was suspended and later Ordered by the Board to be reinstated, to participate with all programs

at HUD, (see CF A-Exh. "M"), to which HUD continuous to be in contempt.

(c) A Contract in Dispute, due to inadequate specifications, can not be Terminated for "default".

(1) The Surety Bonding Co. does not intervene, involving Disputes with Contracts, (see CF A-Exh. "L").

(d) For every Contract in Progress, Appellant provided HUD with a Bid Bond, at the time the Bid was entered, this constitutes an obligation by same Surety Bonding Co., to follow up with Performance and Payment Bond, on same Contract.

(1) HUD well knew that they would be provided with proper Bonding, before payment was made, inspite of the fact that the C/O, with Contract No. 044-78-4578 (Field) that presently remains pending with HUDBCA, under Docket No. 79-383-C16, a completed contract, that during performance of same, unjustly caused the Termination of Appellants open line for Surety Bonding.

The Court's Opinion further states:

"We find no mention of a claim for a breach of contract in the opinion of the Board". (emphasis added).

(a) This supports that the Court's Opinion is based on the Board's Decision, it is not based on the Record nor the Transcript, which shall be taken in consideration when processing an Appeal by Review, and, more so when not allowing oral Argument.

The Court's Opinion further states:

"There is no indication in the Board's opinion that Walber claimed before the Board that she had been discriminated against by a bad faith contract termination because of her sex", (emphasis added);

(a) This again supports that the Court is basing

its Opinion solely on the Board's Decision.

The Court's Opinion further states:

"It is presumed than an officer of the government acts conscientiously and in good faith in discharging his duties. In this case Walber had the burden of overcoming this presumption, which she wholly failed to do".

(a) This is a fictitious presumption..

(b) The Government builds an Iron Shield around its employees, to protect them at all times, from an accusation of unlawfully "discharging his duties" and from perjury in Federal Courts.

(c) This is well supported with all that was before the Court.

(d) As indicated, with Documentation in support thereof, the Contcacting Officer, with his testimony under oath:

(1) Was misleading the Board with Reference to Cost Price Lists, a major issue in this matter.

(2) Was withholding vital information involving Cost Price Lists.

(3) Was misleading the Board to believe that he did not harbor ill feelings towards Appellant, fully aware that prior to his given testimony under oath, he recommended that Appellant be ruled a Non-responsible Contractor, which was overturned by the Board, under HUDBCA 80-472-D20, prior to his given testimony in this case.

(4) Was with his untruthfulness Obstructing Justice.

All these in a Court, other than Federal, would be considered as perjury and would be punishable by Law.

In addition same Contracting Officer is also

guilty in failing to exersize his authority to ascertain that all Contractors on his Program are treated as equal, regardless of sex, whereby he violated the 14th Amendment to Title VII of the Civil Rights Act of 1964, which requires equal protection under the Constitution.

The Court's Opinion further states:

> "In first place, we only review the decision of the Board and do not make findings of fact. In the next place, it would not be in the interest of justice to transfer the case, as required by 28 U.S.C. 1631, as Walber's sex discrimination claims would probably be barred by collateral estoppel in any future district court action because of the Board's finding of no bad faith. Furthermore, Walber has not shown that her sex discrimination claim has any merit or substance on which relief could be granted". (emphasis added).

(a) Again, this was not an Appeal for Review, nor did the Court process this Appeal under Rules set forth for processing Appeals by Review.

With this statement the Court, unjustly simply provided the Government with a Legal Tool, to use as "Power of Suggestion" in the Lower Courts, against Appellant, but, by the Court deciding fourty eight (48) days later, (like an afterthought) to issue a Mandate Affirming the Board's Decision, it is no longer a "Power of Suggestion", without just cause, it deprives Appellant of the Right to sue, after Administrative Relief was exhausted.

Appellant is confident that in a proper Court, with proper Jurisdiction, that will enforce Appellant's Right to Discovery, with Documents controlled by the Government, Appellant will be able to carry the burden of proof to support her claim that this Contract was Terminated in bad faith, involving Sex Discrimination.

Furthermore, this last statement with the Court's Opinion, well supports that the Mandate does not comport with the Court's Opinion.

It is clear now that Appellant erred in filing a Claim of Appeal by Trial De Novo in the CAFC, seeking a Right that was hers to begin with, but:

Title 28 U.S.C. 1631 does provide that:

> "Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred. Added Apr.2, 1982, Pub. L. 97-164, Title III 301(a).

It does not justify, for this harmless error, to deprive Appellant of this provision, set forth

with Court Procedure, by completely barring Appellants Right to sue, after Administrative Relief was exhausted, by issuing a Mandate that does not comport with the Decision, on an issue that clearly was not before the Court, to consider.

GROUNDS FOR APPEAL

1. The Court erred by construing Appellant's "Claim of Appeal by Trial De Novo", to be filed and/or transferred under 28 U.S.C. 1631, to the U.S. District Court, to be a "Petition for Review", from the Decision by the HUDBCA.

2. The Court erred with its Decision entered June 13, 1984, Affirming the Decision by the HUDBCA, since there was no Petition for Review of said Decision, before the Court.

3. The Court erred by omitting with its Decision, all the issues that were before the Court, which are mainly based on the Decision entered by the HUDBCA, all included in "Appellant's Brief on Claim of Appeal by Trial De Novo", that the Court decided to accept, regardless of the fact that same was not in proper format.

4. The Court erred by entering a Decision based on Review, with the absence of the Record and

Transcript before the Court, to Review.

5. The Court erred by entering a Decision, based on a Review of only "Brief of the Appellee" and the Decision by HUDBCA. This is confusing partiality with latitude granted the Government.

6. The Court erred in issuing a Mandate that post dates its Decision by 48 days, that clearly does not comport with its Decision, whereby it appears to be like an after-thought.

7. The Court erred in Denying Appellant's Motion to Vacate Mandate, since there can not be a Judgment issued as a Mandate, on an issue that clearly was not before the Court to Affirm or Deny.

8. The Court erred in refusing to accept for filing the "Motion for Reconsideration on Decision and Opinion and to Include Determination on all Issues Before the Court", as being untimely, the Mandate was issued July 31, 1984, and said Motion was received by the Court August 2, 1984, thereby, accordingly, there was no need for the Motion of Appellant, for Leave to File out of Time a Motion for Reconsideration, for the Court to Deny.

It well supports that had the Court entered a Decision on all the issues before the Court,

included with Brief, it could not have Affirmed the Decision by the HUDBCA, and, had the Court accepted Appellant's Motion for Reconsideration, which truely was within proper time limit from the date the Mandate was issued, which lists all the issues with reference to page number in the Brief, the Court would have had to vacate the Mandate.

As set forth herewith, based on the new evidence it is well indicated that the Government was untruthfull with its Defense before the HUDBCA, all of which is well supported in the CAFC Record File, with Appellant's Exhibits and the Appendix, which includes references to Transcript and the history of Lela Cade, the purchaser involved with this property.

All these clearly supports that in more ways than one, Appellant is entitled to a new Trial, that based on the Sex Discrimination involved, under 28 U.S.C. 1331, the District Courts shall have Original Jurisdiction.

The fact that the CAFC chose to ignore all these, truely makes a mockery of Justice and the Appellate Court System.

GOVERNMENT'S USE OF THE DEPARTMENT OF JUSTICE FOR ITS DEFENSE

The United States Department of Justice Regulations 28 C.F.R. Part 42 issued pursuant to Title VI of the Civil Rights Act of 1964, P.L. 88-352, is a protection for the Public, it Prohibits Discrimination and is there to insure that all people shall be treated as equal.

But, when the United States Government is accused of Discrimination, same United States Department of Justice Defends the Government.

This is like saying:

"Don't do what I do, just do what I tell you to do".

For the two (2) Cases that Appellant had in the U. S. Claims Court, George M. Beasley III from the U. S. Department of Justice, was assigned to be Government Counsel, and, for this matter, in the CAFC, which is a higher Court, same George M. Beasley III, from same U. S. Department of Justice, again, is also assigned to be Government Counsel.

In addition, on an Appeal in the U. S. Court of Appeals for the Sixth Circuit, Under Appellant's Case No. 84-1113, Same Mr. Beasley is also assigned to be Government Counsel.

It makes common sense for the U. S. Department of Justice to have a Commercial Litigation Branch to protect the Government and the General Public, but, for the same U. S. Department of Justice to defend the Government against the very same prohibited Law, that it is supposed to protect the Public against, certainly in unjustified, does not make sense and is a poor system of Justice.

In the interest of Justice, to this, Appellant raises two (2) questions"

(a) How does the U. S. Department of Justice weigh Justice, if on one hand it is to protect Appellant against Discrimination, and, on the other hand, at the same time, in the same matter, it is protecting the Covernment against accusation and Claims involving same Discrimination?

(b) How do the Federal Courts weigh Justice, if on one hand they shall abide by the rules of the U. S. Department of Justice, with provisions set up to protect the public, (Appellant) and, on the other hand they have before them, same U. S. Department of Justice, on the Defense side, for the Government?

Some where along the line, "sovereign immunity" must end some place, or else, involving Appellant's Claims against the Government including Discrimination, Federal Courts are turning back the clock, in order to Grant HUD "sovereign immunity".

Appellant argues that, some where along the line,

she is also entitled to protection by the U. S. Department of Justice, to insure that her Constitutional Rights are not Violated, even by the Government.

RELIEF

WHEREFORE, Appellant prays that for all the reasons set forth herewith, including the Record in the CAFC, this Honorable Court will: (1) Determine the issues listed with Appellant's Motion for Reconsideration filed in the CAFC, all of which were included with her Brief, (2) Determine the issues presented herewith, (3) Enter an Order to Vacate the Mandate issued July 31, 1984, by the CFAC, (4) Enter an Order to transfer this matter under 28 U.S.C. 1631, to the U. S. District Court, Eastern District of Michigan, Southern Division, or, (5) Grant such relief as is necessary to commence action in said Court, involving this matter, a Right so unjustly deprived Appellant in the U. S. Court of Appeals for the Federal Circuit.

Respectfully submitted.

Pauline Walber

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6976 or
313-537-7800

Dated: 2-9-85

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. _____

CAFC No. 84-641, HUDBCA No. 79-421-C40

WALBER CONSTRUCTION CO.,

Appellant,

V.

THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of Feb., 1985, served a true and correct copy of the JURISDICTIONAL STATEMENT, with Exhibits in support thereof and Appendix for Appellant, on the U. S. Court of Appeals for the Federal Circuit, by enclosing same in a sealed envelope with postage prepaid for First Class Mail, addressed to: 717 Madison Place, N.W., Washington, D.C. 20439.

Pauline Walber

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Mich. 48221
Phone: 313-864-6076 or
313-537-7800

Subscribed and sworn to before me on this 12 day of February 1985.

Aileen Tutt

ALEEN TUTT
Notary Public, Wayne County, MI
My Commission Expires April 21, 1985

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. _____

CAFC No. 84-641, HUDBCA No. 79-421-C40

WALBER CONSTRUCTION CO.,

Appellant,

V.

THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of Feb., 1985, served a true and correct copy of the JURISDICTIONAL STATEMENT, with Exhibits in support thereof and Appendix for Appellant, on George M. Beasley, III, Government Counsel, by enclosing same in a sealed envelope with postage prepaid for First Class Mail, addressed to: Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.

Subscribed and sworn to before me on this 12 day of February 1985.

Aleen Tutt

ALEEN TUTT
Notary Public, Wayne County, MI
My Commission Expires April 21, 1985

Pauline Walber

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313-537-7800

Office-Supreme Court, U.S.
FILED
JAN 3 1985
ALEXANDER L. STEVAS,
CLERK

Case No. 84-1764

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CAFC No. 84-641

HUDBCA No. 79-421-C40

PAULINE WALBER, etc.

Appellant,

V.

THE UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
SAMUEL PIERCE, Secretary,

Appellee.

APPENDIX FOR APPELLANT

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313-537-7800

Date: February 9, 1985

51pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX FOR APPELLANT

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Walber Construction Co., Appellant, V. The United States, Appellee

Appeal No. 84-641

Decided June 13, 1984

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Decision entered by the DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT BOARD OF CONTRACT APPEALS

Appeal of WALBER CONSTRUCTION CO.

HUDBCA No. 79-421-C40 (Asbury Park) Contract No. 044-78-4548

Decided July 1, 1983

Appendix C (1-11)

Issues of Fact Misrepresented by HUDBCA with its Decision

Prepared and Submitted by: Pauline Walber D/B/A Walber Construction Co., Appellant

Appendix D

JUDGMENT entered in the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Walber Construction Co., Appellant V. the United States, Appellee

Appeal No. 84-641 -- 79-421-C40

Dated: June 13, 1984

Issued as a Mandate: July 31, 1984

Appendix E

ORDER Denying Appellant's Motion to vacate the Mandate, entered in the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Walber Construction Co., Appellant V. The United States, Appellee

Appeal No. 84-641

Dated: October 4, 1984

Appendix F

Letter from George E. Hutchinson, Clerk for the United States Court of Appeals for the Federal Circuit, informing that the Court Denied Appellant's Motion "for leave to file out of time a motion for reconsideration of the decision and opinion dated June 13, 1984 and the motion to vacate the mandate issued July 31, 1984.

Dated October 4, 1984

Appendix G

NOTICE OF APPEAL, filed in the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Stamped Received: December 24, 1984

Appendix H

Copy of Cover from original JURISDICTIONAL STATEMENT

Stamped Received in the Office of the Clerk, Supreme Court, U. S. January 3, 1985

JURISDICTIONAL STATEMENT was returned by the Supreme Court.

Appendix I

Letter from the Supreme Court, giving reason for returning the JURISDICTIONAL STATEMENT

Dated January 4, 1985

Received: January 18, 1985

Letter was addressed to 3520 W. Outer Drive, the correct No. is 3530 W. Outer Drive

Signed: by Edward C. Schade, Assistant Clerk

Appendix J

Letter from the Supreme Court, giving reason for again returning Jurisdictional Statement, that was resubmitted to the Court

Dated:February 26, 1985

Received: February 28, 1985

Signed by Edward C. Schade, Assistant Clerk

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WALBER CONSTRUCTION COMPANY, Appellant,	)	
V.	)	APPEAL NO. 84-641
THE UNITED STATES, Appellee.	)	

DECIDED: June 13, 1984

Before FRIEDMAN and DAVIS, Circuit Judges, and SKELTON, Senior Circuit Judge

DECISION

The decision of the Department of Housing and Urban Development Board of Contract Appeals (the Board) denying appellant's claims against the government in connection with the termination for convenience by a contracting officer of a contract for repair of HUD-owned property is supported by substantial evidence and is affirmed.

OPINION

On April 6, 1978, contract no. 044-78-4548 was awarded by HUD to appellant Pauline Walber,

(Walber), owner and operator of Walber Construction Company, an unincorporated company, for repairs to HUD-owned property known as Asbury Park. Walber never did any work on the contract nor expended any funds with reference to it. On September 7, 1978, the contracting officer terminated the contract for the convenience of the government pursuant to paragraph 18 of the General Provisions of the contract, and directed Walber to provide HUD with a claim for any expenses incurred in connection with the contract to that date.

Walber submitted a claim for $3,583.20 for items that included damages for being "tied up" on the contract, interest on borrowed funds, cost of bonds and permits, and contractor's time. However, she was unable to substantiate or document the items of interest and costs, and the claims of damages and contractor's time not being recoverable under the Federal Procurement Regulations (she was not on a salary, but was paid out of profits), the contracting officer denied the claim in its entirety on September 25, 1979. Walber appealed the decesion of the contracting officer to the Board under the provisions of the Contract Disputes Act of 1978.

The Board held a hearing under proceedings applicable to the Act. At the hearing Walber contended that the termination of the contract was not for the convenience of the government but was made in bad faith to injure her. The Board found that the contracting officer did not act in bad faith when he terminated the contract and that, in fact, he could have terminated it for default because Walber had done no work nor expended any funds whatever on the contract. Such a default termination would have been detrimental to Walber with regard to her relationship with her surety (she had other contracts in progress). Therefore, the convenience termination was favorable to Walber.

Walber now contends before this court that the contracting officer breached the contract when he terminated it for the convenience of the government and that by doing so he discriminated against her by reason of her sex. We find no mention of a claim for a breach of contract in the opinion of the Board. However, since Walber is acting pro se, we liberally construe her allegations of bad faith as equivalent to claims of breach of contract. But this is of no help to her because the Board found that there

was no bad faith in the termination of the contract. This finding is supported by substantial evidence and is binding on us.

There is no indication in the Board's opinion that Walber claimed before the Board that she had been discriminated against by a bad faith contract termination because of her sex. It is well settled that an issue not presented to the Board cannot be considered by this court on appeal. But in any event, even if the issue was presented before the Board it was without merit, because the Board found there was no bad faith, and, consequeantly, no breach by the contract termination. Such finding eliminated all bad faith breach claims, including those of sex discrimination if they were before the Board.

It is well settled that a contracting officer has the unfettered right in his discretion to terminate a contract for the convenience of the government, and his decision is conclusive, if he acts in good faith. See Federal Procurement Regulation 1-8.703(a). It is presumed that an officer of the government acts conscientiously and in good faith in discharging his duties. In this case,

Walber had the burden of overcoming this presumption, which she wholly failed to do.

The Board correctly approved the termination for convenience of the contract by the contracting officer, and also his rejection of all of the money claims of Walber, for the reasons stated above.

Walber asks us in this appeal to transfer the case to a district court because of her sex discrimination claim and so that she might have a "trial de novo.". This we decline to do. In the first place, it would not be in the interest of justice to transfer the case, as required by 28 U.S.C. 1631, as Walber's sex discrimination claims would probably be barred by collateral estoppel in any future district court action because of the Board's finding of no bad faith. Furthermore, Walber has not shown that her sex discrimination claim has any merit or substance on which relief could be granted.

The findings of the Board are supported by substantial evidence, and its decision is correct as a matter of law and is affirmed.

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, D. C.

Appeal of:	HUDBCA NO. 79-421-C40
WALBER CONSTRUCTION CO.	(Asbury Park)
(Contract No. 044-78-4548)	

Ms. Pauline Walber, d/b/a
Walber Construction Company
3530 West Outer Drive
Detroit, Michigan 48221
For the Appellant, pro se

Joan J. Saloschin, Esquire
Office of General Counsel
U.S. Department of Housing
and Urban Development
Washington, D. C. 20410
For the Government

DECISION

Statement of the Case

This is an appeal concerning the termination for the convenience of the Government of Contract No. 044-78-4578 on September 7, 1978, and the disallowance of the termination settlement claim filed by Walber Construction Company, Appellant herein, after termination of the contract.

Appellant wrote a letter dated June 29, 1979 to the Secretary of the Department of Housing and Urban Development ("HUD") contesting the appropria-

teness of the contract termination. Appellant's letter of June 29, 1979 was forwarded to the Board of Contract Appeals, which treated the letter as a notice of appeal and docketed it accordingly. Subsequent to the docketing of the appeal, the Contracting Officer issued a final decision on Appellant's termination settlement claim, denying it in its entirety. Inasmuch as Appellant had attached a copy of the termination settlement claim which had been submitted to the Contracting Officer to the notice of appeal addressed to the Secretary, the Board treated the appeal as encompassing all items on the settlement claim subsequently denied by the Contracting Officer in a final written decision dated September 25, 1979.

Appellant's settlement claim for $3,583.20 was for damages of 20 percent of the total price of the contract for "being tied up" with the contract and for interest on borrowed funds reserved for contract performance, costs for bonds and permits and "Contractor's time involved with Contract." The Board treated Appellant's appeal as an election to proceed under the Contract Disputes Act of 1978 because of the nature of the relief sought by

Appellant and the fact that the claim was not filed with the Contracting Officer until after the effective date of the Act.

Both before and after the hearing, the Government moved for partial summary judgment on the issue of damages, which Appellant had recharacterized before the Board as a breach of contract claim. The motion was denied on the ground that there were material facts in dispute. At the hearing, Appellant attempted to amend its claim to add specific cost items that had not been presented to the Contracting Officer at any time. The request to amend was denied but a proffer was permitted.

We deny the appeal of Walber Construction Company in its entirety for the reasons set forth in this Decision.

Findings of Fact

1. On January 10, 1978, HUD issued an Invitation for Bid on a contract for repair of a HUD-owned property located at 15854 Asbury Park, Detroit, Michigan. Bid opening was January 24, 1978. On February 28, 1978, Appellant was notified that it was the successful bidder of the contract. Although Appellant had not submitted the lowest bid, it was

determined by HUD that the lowest bidder had made a mistake in bid and after that determination, Appellant's bid of $11,471 was accepted as the lowest responsible bid. (AF, Tabs 2 and 3E; Tr. 363-64,406.)

2. On April 6, 1978, Contract No. 044-78-4548 was awarded to Appellant for the repair of the Asbury Park property.

3. Appellant is wholly owned and solely operated by Pauline Walber ("Walber"). Walber is compensated for her time solely out of profits earned by Appellant. (Tr. 68, 283.)

4. In accordance with the policy of the HUD Detroit Area Office Contracting Section, Walber prepared a proposed amendment for additional work not included in the contract that she believed would be necessary to make the property safe and habitable. Walber's proposed amendment included forty-two (42) separate items to be added to the contract, which she valued at $2,070.00. (AF, Tab 3G.; Tr. 171, 366.)

5. After Walber presented the proposed amendment to HUD, a HUD Inspector, Ralph Miller, conducted a walk-through inspection of the property with Walber on April 12, 1978, to determine whether the

proposed amendment items were necessary (Tr. 367, 369).

6. At the end of the walk-through inspection, Miller gave Walber a written notice to proceed (AF, Tab 3F)

7. The completion date of the contract was July 11, 1978, as determined from the date of the notice to proceed (Tr. 367-68).

8. At the walk-through inspection, Miller had provisionally approved a number of the items listed on Walber's proposed amendment. Walber's estimated prices for the additional work items deemed by Miller to be necessary were referred to John Janetta, a HUD construction analyst, for cost evaluation. (Tr. 370, 394.)

9. Janetta, in performing the cost evaluation on Walber's proposed amendment, reduced a number of the prices Walber had requested and also disallowed some of the items Miller had provisionally approved at the walk-through inspection. Janetta had authority to deny items provisionally approved by Miller. (AF, Tab 3G; Tr. 397-401.)

10. HUD prepared a typed amendment form, listing the additional work and prices for that work

approved by Janetta, which was signed by Janetta and Don Snyder, the Contracting Officer, but not by Walber (AF, Tab 3G).

11. Walber and Janetta were unable to agree on the prices for the approved amendment items. Walber believed that Janetta was deliberately attempting to set prices below those approved for other contractors for similar work on other contracts. She met with the Contracting Officer, Don Snyder, who tried to "smooth over" the rocky relationship between Walber and Janetta, but Snyder did not actually evaluate or study the prices in dispute. (Tr. 174, 179, 210, 376.)

12. Snyder had asked Janetta about Walber's accusations that he was deliberately setting prices low. Snyder felt assured from talking with Janetta that the prices he had approved for Walber were comparable to prices that he was setting for similar work on other contracts, and that those prices were within the range of the price guidelines for specific contract repair items prepared by Brothers Specifications for HUD. (Tr. 418-420.) We find no evidence that Janetta was deliberately setting prices for amendment items unreasonably low to the

detriment of Appellant.

13. Despite the fact that the notice to proceed had been given on April 12, 1978, Appellant never performed any work on the contract (Stipulation of the parties).

14. Walber testified that work was not started on the contract because "someone" had told her not to start work until the problem with the prices on the proposed amendment had been resolved. Walber did not remember who that person was but assumed that it must have been Janetta or Snyder. Snyder testified that no such direction had ever been given to Walber by him, or to his knowledge, by Janetta. She received no written notice to stop or delay work on the contract. (Tr. 298, 300, 330, 339-80.)

15. Based on a preponderance of the evidence, we find that Walber was not told to delay starting work on the contract by Snyder, and Snyder did not have knowledge of or ratify any such statements that may have been made by Janetta to that effect.

16. Snyder was being pressured by the HUD Disposition Section to have the contract completed. HUD had entered into a contract for sale of the

Asbury Park property, and it was because of that contract for sale that the repair contract had been advertised. Snyder told Walber of the pressure he was under to get the repairs completed. (Tr. 363, 374, 378.)

17. During the period after April, 1978, Snyder was in transition to another job in HUD and Therese Dziekan was the acting Contracting Officer. However, Snyder continued to meet with Walber to listen to her complaints and to communicate to her the need to complete the contract repairs so that the sale of the Asbury Park property could be closed. (Tr. 416-17.)

18. By letter dated September 7, 1978, Contracting Officer Therese Dziekan terminated the contract for the convenience of the Government pursuant to Paragraph 18 of the General Provisions of the Contract. The Contracting Officer's Notice of Termination directed Appellant to provide to HUD a claim for any expenses incurred in performance of the contract to that date. (AF, Tab 2.)

19. Although the Notice of Termination did not state the reasons why the termination was for the convenience of the Government, Don Snyder, who

was consulted on the decision to terminate, testified that the main reason for the termination was Appellant's failure to start work on the contract. Appellant's unwillingness to negotiate on the prices for the amendment work was also a factor in the decision, though it was secondary to the need for contract performance. Snyder further testified that the Department could have terminated the Contract for default, but he recommended that the less onerous termination for the convenience of the Government be used so as not to damage Appellant's relationship with its surety. (Tr. 382-385.)

20. Paragraph 18 of the General Provisions of the contract (SF 23-A) provides that the clause in Section 1-8.703 of the Federal Procurement Regulations (FPR) is incorporated by reference into the contract as if fully set forth. Section 1-8.703 of the FPR entitled "Termination clause for fixed-price construction contracts," provides in pertinent part as follows:

1-8.703 - TERMINATION FOR CONVENIENCE OF THE GOVERNMENT

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall

determine that such termination is in the best interest of the Government...

(c) After receipt of a Notice of Termination, the contractor shall submit to the Contracting Officer his termination claim, in the form and with the certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination.....

(d) Subject to the provisions of paragraph (c), and subject to any review required by the Contracting agency's procedures in effect as of the date of execution of this contract, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done....

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall..determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(1) Wth respect to all contract work performed prior to the effective date of the Notice of Termination, the total (without duplication of any items) of --

(i) The cost of such work;
(ii) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders,

(iii) A sum, as profit on (i), above, determined by the contracting officer pursuant to 1-8.303 of the Federal Procurement Regulations ... Provided, however, that if it appears that the

contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (iii)..

(f) Cost claimed, agreed to, or determined pursuant to paragraphs (c), (d), and (e) of this clause shall be in accordance with the contract cost principles and procedures in Part 1-15 of the Federal Procurement Regulations (41 CFR 1-15) in effect on the date of this contract.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from the effective date of Termination and for a period of three years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the office of the Contractor ... all his books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder.....

21. On July 3, 1979, Pauline Walber personally delivered Appellant's termination claim in the form of a blanket invoice and "Explanation of Invoice" to Irving Beaupied, then acting Contracting Officer. The claim was dated June 29, 1979. (AF, Tab 6.)

22. The invoice submitted as a termination claim was for $3,583.20. The attached Explanation of Invoice briefly recited Appellant's version of the history of the contract from bid opening to the termination for convenience and itemized the termination claim as follows:

Damages for being tied up to (sic) Contract from 2-28-78 to 9-7-78 plus Interest on borrowed funds, reserved for cost to Rehabilitate property,

from 4-12-78 to 9-7-78--20% of Contract	$2,294.20
Cost for Bonds & Permits	289.00
Contractor's time involved with Contract	1,000.00
Total amount due	$ 3,583.20

Will accept property "As Is" in lieu of money. (AF Tab 6.)

23. Beaupied asked George Day, Special Assistant to the Director of the HUD Detroit Area Office, who had served as an Acting Contracting Officer for five months in 1979, to evaluate Appellant's termination claim. Day decided that an audit was necessary because of the lack of substantiation provided by Walber in support of the claim. On August 9, 1979, an audit was requested. The audit report, dated September 7, 1979, indicated that the auditors were unable to gain sufficient access to Walber's files to gather information relevant to the termination claim. (AF, Tab 8; Tr. 435-37, 438, 442.)

24. By letter dated August 6, 1979, HUD requested substantiation of Appellant's claim for the bonds and permits. (AF, Tab 1.) George Day called Walber to ask her to bring in cancelled checks to

help support the claim. Walber did bring in can-cancelled checks, as Day had requested, but they contained no reference to the bond and permits which Appellant claimed were purchased for repair of Asbury Park. (Tr. 439, 443-44.)

25. On August 15, 1979, a settlement conference on the termination claim was held by Beaupied and Day with Walber. The conference was terminated in less than an hour because Walber insisted that she absolutely had to have money for "damages" and for her personal time, and the Government representatives insisted that the Federal Procurement Regulations did not permit payment for either damages or a contractor's time on termination claims. (Tr. 443.)

26. By letter dated September 5, 1979, Beaupied notified Walber that the City of Detroit had no record of a permit issued to Walber for the Asbury Park property, and that the permit number written on the checks Walber had submitted to substantiate the claim did not refer to Asbury Park. The letter also advised Walber that the authorized bonding fee was $109.00. (AF, Tab 10.)

27. By letter dated September 10, 1979, [illegible] APPENDIX B-13

Beaupied notified Walber that the bonding company and agents for the bonding company had advised HUD that Walber had incurred no cost for the bond. Therefore, HUD would not approve payment of $109.00 for bond listed on the termination claim. (AF, Tab 11.)

28. Charles Platt, Inc., the bonding company, had billed Walber for $109.00 in July 1978 for the performance bond for Asbury Park. In March, 1979 prior to Appellant's filing of its termination claim, the bonding company issued a credit memo to Walber for $109 on the bond, resulting in no bond cost to Appellant. (Gov't. Exh. 1.)

29. By final decision dated September 25, 1979, Beaupied denied Appellant's termination claim in its entirety, citing the lack of substantiating documentation for denial of the claim for bonds and permits and the Federal Procurement Regulations for denial of the claim for damages and Walber's personal time. (AF, Tab 1-A.)

30. The contract was readvertised by HUD, and on June 21, 1979 was awarded to William Murray for $12,770.00 (Stipulation of the parties).

Discussion

I. The Termination for Convenience

Appellant contends that the termination for convenience was made in bad faith and was not beneficial to the Government. Appellant's argument in support of the charge rests on two separate theories. First, Appellant contends that the Government negotiated in bad faith on Appellant's price requests for the items proposed by Appellant in its first amendment request and that Appellant's refusal to accept what it characterized as unfair price offers was an excuse for terminating the contract. Second, Appellant argues that because the Government did not make as large a profit on the sale of the Asbury Park property after reprocurement of the rehabilitation work as it could have if Appellant had been allowed to complete the contract, the termination and subsequent reprocurement of contract services was not beneficial to the Government or "for its convenience."

Termination of a contract for the convenience of the Government is an action to be taken within the discretion of the Contracting Officer. That discretion has been interpreted as broadly as possible to allow the Government the greatest

flexibility in adapting to changing needs for services, fluctuating market conditions, availability of funds, and other factors that it deems require a change in a particular procurement. It does not impute fault to the contractor. Colonial Metals Company v. United States, 204 Ct. Cl. 320, 494 F. 2d 1355 (1974); Nolan Bros., Inc. v. United States 186 Ct. Cl. 602, 405 F. 2d 1250 (1969). In the absence of bad faith or abuse of discretion, the Contracting Officer's election to terminate for convenience is conclusive. John Reiner & CO. v. United States, 163 Ct. Cl. 381, 325 F. 2d 438 (1963), cert. denied, 377 U.S. 931 (1964). Because the Government has an inherent right to terminate contracts for its convenience, the burden of proving that the termination was not taken for the convenience of the Government, but was carried out in bad faith for reasons not related to the Government's best interests, is the contractor's burden. Librach v. United States, 147 Ct. Cl. 605 (1959).

Bad faith is an onerous charge that requires "well-nigh irrefragible proof" to overcome the presumption that public officials act conscientiously and in good faith in discharging their duties.

Knotts v. United States, 128 Ct. Cl. 489, 492, 121 F. Supp. 630, 631 (1954). Specific intent to injure the contractor must be proved to establish bad faith. Kalvar Corporation v. United States, 211 Ct. Cl. 192, 543 F. 2d 1298 (1976). Simply because Appellant does not like what Government officials have done does not mean that they acted in bad faith.

We find that in the instant case Appellant has failed in all respects to carry its burden of proof that the Contracting Officer acted in bad faith when she terminated the Asbury Park contract for the convenience of the Government. The record simply does not support a conclusion that any of the Government officials at HUD who dealt with Walber intended to injure her. Appellant did not present compelling evidence of unfair pricing of extra work items proposed by Appellant, nor do we in any way agree that haggling over prices on amendments is anything out of the ordinary in the life of a Government contractor. We find no animus against Appellant. In fact, it would appear that the Government made every effort to protect Appellant from the worst effects of a termination. We note that the former Contracting Officer recommended that the

termination of the contract be taken for the convenience of the Government rather than default to protect Appellant's bonding status. Given the facts in this case, a termination of Appellant's contract for default would have been justified. Appellant's utter failure to perform any work at all under the contract was outrageous and certainly merited no compassionate considerations of the burdens of a default termination. The Government had no obligation to Appellant to terminate this contract for convenience rather than for default.

Appellant has suggested a most unique test to determine what constitutes convenience of the Government; that being the ultimate profitability of a contract. First, we cannot agree with Appellant that the Government lost more than time in terminating and reprocuring the repair services. The Government had received nothing from Appellant from the award of the contract until its termination. By reprocuring the contract services, it was finally able to sell the property in good repair. In any event, we note that even if the Government had realized a smaller profit or even lost money on the ultimate disposition of the property, procurement

policy considerations are within the discretion of the Government's procurement officials. Many competing needs and policies are aften balanced in a way that may not appear at first blush to be beneficial, but have been deemed to be so by those officials responsible for such policies. Even a ill-advised or foolish procurement policy decision does not constitute bad faith. We find the charge of bad faith in relation to the instant contract termination so totally lacking in merit as to be frivolous. We deny that portion of Appellant's case challenging the propriety of the termination for convenience.

II. The Termination Claim

Appellant presented a bare-bones termination settlement claim to the Contracting Officer nine months after the termination. It was not supported by documentary evidence. Moreover, it lacked the minimal detail necessary to make any intelligent appraisal of how much money, if any, Appellant was entitled to recover. The Contracting Officer and his staff attempted to obtain from Appellant substantiating documents, work logs, or pay records that might have supported the claim. Appellant,

however; offered only the most grudging cooperation, apparently not understanding that the Government's attempt to gain more information was not meant as harrassment but as assistance. We find that Appellant is entitled to no payment for the items presented to the Contracting Officer in the termination claim for the reasons set forth below.

A. Damages for forebearance from other contract workand interrest on borrowed funds.

Appellant claimed that it was entitled to twenty-percent of the face value of the contract for interest on borrowed funds alleged to have been reserved for performance of the contract and for "being tied up to Contract from 2-28-78 to 9-7-78." Appellant presented no evidence of actual interest charges incurred on loans, or a loss of interest on committed funds that were specifically related and necessary to the performance of the instant contract or business expenses of Appellant. Moreover, interest on borrowing and the cost of financing is not an allowable cost, as a general matter. 41 C.F.R. 1-15.205-17. A contractor can only recover interest on loans as part of a termination for convenience claim if the loans were necessary for performance

of the specific contract and were obtained solely for that purpose. Q.V.S., Inc., ASBCA No. 7513, 1963 BCA 3699. Not only did Appellant fail to present evidence of borrowings or financing costs, but admitted that any borrowing or use of money by it was not separated and restricted for each contract. Therefore, we find that Appellant is not entitled to interest on any borrowed funds or the cost of money as a termination claim item.

Likewise, "being tied up" with a contract for a period of time is not a recoverable cost. Such a claim is a request for consequential damages which is not recoverable as a termination claim item. Damages and anticipatory profits are only recoverable for breach of contract. G.L. Christian & Associates v. United States, 160 Ct. Cl. 312 F. 2d 418, cert. denied, 375 U.S. 954 (1963). This contract was not breached by the Government. The purpose of a termination settlement claim is to compensate a contractor for the work done and the preparations made. 41 C.F.R. 1-8.301(a). Appellant did no work on the contract prior to termination and made only the most minor preparation for eventual

performance. We cannot see how Appellant was "tied up" with the contract for any period of time that would give rise to a claim for money. Because Appellant did not perform any of the contract work over the entire period of time, it certainly was free to carry on other business obligations unfettered by the demands of the instant contract which it felt no obligation to satisfy. We find the claim for damages to be frivolous and wholly without merit as a matter of law.

B. Cost for Bonds and Permits

Although the cost of performance bonds and permits are recoverable under a termination for convenience settlement, the contractor has the burden of establishing the fact that such costs were incurred and their amount. See Roberts International Corp., ASBCA No. 15118, 71-1 BCA 8869.

Appellant failed to carry its burden of proof that it incurred any costs for either performance bonds or permits on the instant contract. The Government's position that no such costs had been incurred was overwhelmingly supported by the evidence in the record. Appellant is entitled to no allowance for either bonds or permits on the termination

claim for the Asbury Park contract..

C. Contractor's time involved with Contract

Walber requested $1,000.00 for time she spent "involved with the contract." Walber is compensated solely out of profits and is paid no salary or other form of compensation. On a termination claim, a contractor is entitled only to the unreimbursed costs of performance plus a reasonable profit on those incurred costs. 41 C.F.R. 1-8.703(e). If a contractor incurs no costs, it cannot recover profit on those costs. Shin Enterprises, Inc., ASBCA No. 16542, 72-1 BCA 9391. Appellant incurred no costs for Walber's time because Walber was not compensated for the time she spent on the contract preparations. While compensation to sole proprietors may be a recoverable cost under certain limited circumstances, the compensation must be for actual personal services rendered rather than a distribution of profits. 41 C.F.R. 1-15.205-6(2)(i) and (3); 41 C.F.R. 1-15.403-7(c). In the absence of a specific provision in the contract, "constructive" compensation of an unsalaried proprietor is not allowed. Norman M. Giller & Associates v. United States, 210 Ct. Cl. 80, 535 F 2d 37 (1976).

At the hearing, Walber was permitted to make an offer of proof as to parking, gas and depreciation expenses incurred by her in driving back and forth to the HUD office and to the property, although such costs were never claimed by Walber prior to the hearing. We have no jurisdiction to consider claims not presented to the Contracting Officer and denied by him. 41 U.S.C. 607(d). However, Appellant may submit such additional termination claims to the Contracting Officer, who has the discretion to consider them in accordance with 41 C.F.R. 1-8.703(c). In any event, this Board would have no jurisdiction to consider such claims because they would, of necessity, be submitted to the Contracting Officer more than one year after the effective date of the termination for convenience. 41 C.F.R. 1-8.703(g).

CONCLUSION

The termination for convenience was not made in bad faith and shall not be disturbed. Appellant is not entitled to payment for any of the items listed on its termination claim. The appeal of Walber Construction Company is denied in its entirety.

HUD BOARD OF CONTRACT APPEALS

JEAN S. COOPER
Administrative Judge

Concur:

David T. Anderson
Administrative Judge

Administrative Judge Edward Terhune Miller was absent on official leave and did not participate in this decision.

Dated: This 1st day of July, 1983.

IN THE
SUPREME COURT OF THE UNITE STATES

WALBER CONSTRUCTION CO., Appellant,	Case No. _____
V.	
THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, Appellee.	CAFC No. 84-641
	HUDBCA No. 79-421-C40

APPENDIX FOR APPELLANT

ISSUES OF FACT MISREPRESENTED BY HUDBCA WITH ITS DECISION

APPX. B-4, Paragraph 4 states:

"In accordance with the policy of the HUD Detroit Area Office Contracting Section, Walber prepared a proposed amendment for additional work not included in the contract that she believed would be necessary to make the property safe and habitable. Walber's proposed amendment included forty-two separate items to be added to the contract, which she valued at $2,070.00 (AF Tab 3G.; Tr. 171, 366.)"

Tab 4, letter awarding Contract, clearly indicates that as a condition included with Award of Contract, Appellant was instructed to prepare the initial Amendment, prior to Walk-through (W/T). This is considered a start-up activity.

APPX. B-5, Paragraph 6, states:

"At the end of the walk-through inspection, Miller gave Walber a written notice to proceed (AF, Tab 3F)."

This Document indicates that property was "Inspected by: Ralph Miller, Date: 4-12-78". The date

that authorization to commence work was received by Appellant, remained open.

To avoid having the clock run towards completion date, was the reason for not entering the date received, (see CF A-Exh. "K"), in addition, T.168 HUDBCA 79-387-C19 (10-30-79) (Sawyer), Government's Witness, James Sullivan states:

"The amendments should normally be resolved prior to the time the construction starts".

These supports that Appellant was instructed not to commence work until further Decision by HUD.

APPX. B-5, Paragraph 9 states:

"Jannetta, in performing the cost evaluation on Walber's proposed amendment, reduced a number of the prices Walber had requested and also disallowed wome of the items Miller had provisionally approved at the walk-through inspection. Janetta had authority to deny items provisionally approved by Miller. (AF, Tab 3G; Tr. 397-401)"

This certainly confirms the poor relationship between Jannetta and Appellant. At the W/T, present with Miller were two (2) men from Brothers Inc., it did not justify for Jannetta who did not see the property to disallow Items that by the opinion of three (3) authorized men that saw the property, the Items that they approved.

Jannetta well knew that Appellant would be forced to perform this additional work, at no cost to

the Government, in order to obtain City Certification on total repairs. This was nothing new, coming from Jannetta, he adopted this action against Appellant, as a "steady diet", which supports that Appellant was a victim of Government abuse and Sex Discrimination. Jannetta did not burden the Male Contractor, with such abuse.

APPX B-4, Paragraph 12 states:

"Snyder had asked Janetta about Walber's accusations that he was deliberately setting prices low. Snyder felt assured from talking with Janetta that the prices he had approved for Walber were comparable to prices that he was setting for similar work on other contracts, and that those prices were within the range of the price guidelines for specific contract repair items prepared by Brothers Specifications for HUD. (Tr. 418-420.) We find no evidence that Janetta was deliberately setting prices for amendment items unreasonably low to the detriment of Appellant."

Don Snyder, as a C/O, fully aware of the poor relationship between Jannetta and Appellant, to insure that all Contractors on his Program shall be treated as equal, had a duty not to just ask Jannetta. Don Snyder's obligation was to check Amendment with the three (3) men present at W/T and with Cost Price List, for amounts allowed, to determine if Jannetta's action was justified.

Don Snyder conveniently failed to do so. (see Appendix B-4 Parg. 11.)

AF A-Exh. #5, Amendments approved for William Murray & Co., the Contractor that was later awarded this Contract, supports that Jannetta was abusive and Discriminating with the demands made upon Appellant, with regard to the initial Amendment, demanded by HUD, that Appellant prepare, Tr. 201-204.

AF A-Exh. #6 and A-Exh. #7, also support that Jannetta was deliberately setting prices on Amendments and denying Amendments for cost increase, to be abusive and financially cause damage to Appellant.

All these evidence and testimony, the Board conveniently and completely chose to ignore with its Decision.

APPX B-7, Paragraph 15 states:

"Based on a preponderance of the evidence. we find that Walber was not told to delay starting work on the contract by Snyder, and Snyder did not have knowledge of or ratify any such statements that may have been made by Janetta to that effect."

The Board is basing this purely on testimony given by Government Witnesses, not on documentation to support this issue, since the Government claims to have discarded this main evidence.

The W/T Specification book, was the main evidence essential for Appellant to prove that she was instructed not to commence work, pending a Decision by HUD.

(a) The Government controls all Documents essential to use as evidence.

(b) The HUDBCA without just cause allowed this Appeal to prolong for three (3) years.

(c) This granted the Covernment the opportunity to claim, for the first time, that the W/T Specification Books have been Destroyed.

(d) Now, HUDBCA rules that "based on a preponderance of evidence" which was all "hear-say by Government Witnesses, that Appellant failed to prove that she was instructed not to commence performance on Contract.

This most certainly is lacking Justice, since Government Witnesses, including Don Snyder, were just as untruthful on this issue, as they were untruthful with the manufacturing of two (2) types of Cost Price Lists, that never existed, to support Government's Defense. (Jurs. St. 11-14 and A-Exh. #1 and #2.)

APPX B-7, Paragraph 16 states:

"Snyder was being pressured by the HUD Disposition Section to have the contract completed. HUD had entered into a contract for sale of the Asbury Park property, and it was because of that contract for same that the repair contract had been advertised. Snyder told Walber of the pressure he was under to get the repairs completed. (Tr. 363, 374, 378.)"

This is totally misrepresented by the Board and Don Snyder:

Lela Cade the alleged Purchaser, did not purchase this property.

This property was to be used as a replacement of a defective property previously sold Lela Cade, known as the Coyle property. To be exact, this is the third defective property that Lela Cade got stuck with, by HUD, who supposedly is providing adequate Housing for the Low and Moderate income family.

This also supports that Lela Cade had two (2) Government acquired properties tied up; this property and the Coyle property she was living in, and, all these failed to move Don Snyder and other HUD Employees to take proper action:

(a) Appellant's Amendment request that caused disputes, is dated April 10, 1978 (Tab 3G 2).

(b) Contract was Terminated September 7, 1978. The Government waited almost five (5) months to settle this issue and then failed to inform Property Disposition that Contract was Terminated.

(c) Rapid Reply Letter from Disposition (Tab 17), (this Document Judge Cooper refused to allow as evidence and refused to accept to supplement Record File). dated May 24, 1979, more than one year from the date of Dispute over Appellant's Amendment Request, states:

> "Emergency - Please Send out Bids.
>
> Dispo wasn't aware of the cancellation of Contract #044-78-4548
>
> Note: Please repair ASAP - We have a buyer who has been waiting over a year"

(d) This can not be considered as pressure that

nyder was under to get repairs completed, that ould justify Termination of Appellant's Contract, o be in the best interest of the Government.

This clearly supports that Contract was Terminated in bad faith, based on Sex Discrimination.

For further information of Lela Cade's involvement with HUD and as an example as to how the U. S. Department of Housing and Urban Development provides Housing for the low and moderate income family, see CAFC file, Appendix #26, "Lela Cade the Purcasher" (8 Pages) and in support thereof, see Legal Documents in HUDBCA Appeal File, 79-421-C40.

APPX B-8, Paragraph 19, states:

"Although the Notice of Termination did not state the reasons why the termination was for the convenience of the Government, Don Snyder, who was consulted on the decision to terminate, testified that the main reason for the termination was Appellant's failure to start work on the contract. Appellant's unwillingness to negotiate on the prices for the amendment work was also a factor in the decision, though it was secondary to the need for contract performance. Snyder further testified that the Department could have terminated the Contract for default, but he recommended that the less onerous termination for the convenience of the Government be used so as to not damage Appellant's relationship with its surety. (Tr. 382-385.)"

This was completely misrepresented by Don Snyder and the Board, who was made aware of this.

Don Snyder is not in a position to Claim that he chose to Terminate Contract "for the convenience

of the Government","so as not to damage Appellant's relationship with its surety":

(a) Don Snyder was fully aware that a Surety Co. cannot intervene with Contract Disputes, (see CAFC A-Exh. "L").

(b) Due to the Dispute over the Amendment, there is no way that Don Snyder could have Terminated this Contract by Default..

(c) Don Snyder, September 28, 1978, twenty one (21) days after Contract was Terminated, without just cause and with the absence of any evidence on Record, to support same, recommended that Appellant be ruled as a non-responsible Contractor, (see CAFC A-Exh. "M").

(d) As a result of this recommendation, without due process of Law, Appellant was suspended from participating with HUD Programs.

(e) Under HUDBCA 80-472-D20, the Hon. B. Paul Cotter Jr., Administrative Judge, entered an ORDER, April 21, 1980, to reinstate Appellant, "with full right to participation in all programs of the Department of Housing and Urban Development."

As of this date, the Government remains in contempt of said ORDER.

All these well supports that upon instructions by Don Snyder, Contract was Terminated in bad faith, involving Discrimination.

In addition, the Government did not have a well drafted Termination for Convenience Clause, with this, nor any of the other twelve (12) Terminated Contracts. which constitutes a Breach of Contract, which Appellant Claims involved Sex Discrimination.

The lack of a well drafted Termination for Convenience Clause, can be well confirmed with the HUDBCA Rule 4 File.

APPX. B-12, Paragraph 23 states:

"Beaupied asked George Day, Special Assistant to the Director of HUD Detroit Area Office, who had served as an Acting Contracting Officer for five months in 1979, to evaluate Appellant's termination claim. Day decided that an audit was necessary because of the lack of substantiation provided by Walber in support of the claim. On August 9, 1979, an audit was requested. The audit report, dated September 7, 1979, indicated that the auditors were unable to gain sufficient access to Walber's files to gather information relevant to the termination claim. (AF, tab 8: Tr. 435-37, 438, 442)"

With this, the Board's Decision is obscuring the true facts and conveniently fails to indicate that on Page 1, under "SUMMARY", this Document, the Audit Report, states:

"The original contracts (Paragraph 23 of General Provisions) do not require the Contractor to give us access to records."

On Page 3, said Document states:

"The fact that construction began on three of the four contracts (including fairly substantial progress on 1605 Edison) supports the Contractor's contention that she devoted time to start-up activities." (Emphasis added).

Same page in Paragraph 5, states:

"The contracts were originally awarded on the fixed-price basis as opposed to the cost-reimbursement basis; for completed contracts, the contractor's actual costs would be irrelevant to HUD."

These are just a few of the facts misrepresented with the Board's Decision. Had the CAFC informed Appellant that it was going to construe her Appeal for the Right to a new Trial, that Appellant did not know she had, to be a Petition for Review of the Board's Decision, Appeal would have been presented accordingly.

It can well be noted that for the most, each time the Decision refers to the Transcript, it is to testimony by Government Witnesses, who were well protected, by the Board, against perjury, and/or contempt of Court, by failing to comply with ORDERS, issued by the Board.

It can also be noted that the Board with its Decision, is using as precedent, Decisions by Boards of Contract Appeals and by the U. S. Claims Court

(a) If all Boards of Contract Appeals process Appeals in same manner that Appellant's twenty three (23) Contracts on Appeal were processed by the HUDBCA and Decisions entered by the Board, this is including the Appeals that presently remain with the Board, that have been there since 1979 (almost 6 years), waiting for a Decision on Hearings held in November of 1982, to use these as an example, in the interest of justice, that shall not be delayed, a change in this Federal Court system, is clearly needed.

(b) Decisions by the U. S. Claims Court do not include a Trial by Jury, they are entered based on the opinion of a Federal Judge only.

Of all the Decisions used as precedent herewith, not one was entered in a U. S. District Court, which includes for the most, a Trial by Jury, whereby, Government Witnesses have second thoughts and will not as freely, commit perjury, with false testimony, in addition;

APPX. B-14, well supports that the Board did not have jurisdiction on some of Appellant's Claims presented.

There is no just cause for the CAFC to deprive Appellant of her Right to sue in the U. S. District Court, after Administrative relief was exhausted, by entering a Judgment on an issue clearly not before the Court to Affirm or Deny, issued as a Mandate, like an after-thought, way beyond the twenty one (21) days, as provided with Appellate Court Rules of Procedure.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WALBER CONSTRUCTION COMPANY, Appellant, v. THE UNITED STATES, Appellee.	)	No. 84-641 79-421-C40

JUDGMENT

ON APPEAL from the Board of Contract Appeals - HUD

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED.

DATED: June 13, 1984

ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk

_____
Clerk

ISSUED AS A MANDATE: July 31, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

WALBER CONSTRUCTION CO., Appellant, v. THE UNITED STATES, Appellee.	)	Appeal No, 84-641

O R D E R

Having considered the motion of the appellant to vacate the mandate of this Court issued July 31, 1984;

IT IS ORDERED THAT:

The motion be, and the same is hereby denied.

FOR THE COURT

_____
Judge

Dated: October 4, 1984

Washington, D.C.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson
Clerk

Telephone: 633-6550
Area Code 202

October 4, 1984

Ms. Pauline Walber
D/B/A Walber Construction Company
3530 West Outer Drive
Detroit, Michigan 48221

RE: Walber Construction Company v. The U.S.
Appeal No. 84-641

Dear Ms. Walber:

The Court has today denied the motion of appellant for leave to file out of time a motion for reconsideration of the decision and opinion dated June 13, 1984 and the motion to vacate the mandate issued July 31, 1984.

FOR THE COURT

CLERK

cc: Mr. George M. Beasley, III
Mr. David M. Cohen

GEH:ejc

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WALBER CONSTRUCTION CO., Appellant, V. THE UNITED STATES, Appellee.	Appeal No. 84-641
	RECEIVED Dec. 24, 1984 United States Court of Appeals for the Federal Circuit

NOTICE OF APPEAL

Notice is hereby given that Pauline Walber D/B/A Walber Construction Co., above named, hereby Appeals to the Supreme Court of the United States from the order Denying Appellant's Motion to Vacate Mandate and the Order Denying the Motion of Appellant for Leave to file out of time a Motion for Reconsideration of the Decision and Opinion entered by the Court.

Both Orders were entered in this action on the 4th day of October, 1984.

The Statute under which this Appeal is taken to the Supreme Court of the United States is 28 U.S.C 2106.

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313-537-7800

Dated: 12-20-84

APPENDIX G

RECEIVED
JAN 3 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WALBER CONSTRUCTION CO.

V.

U. S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Jurisdictional Statement

APPENDIX H

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

January 4, 1985

Ms. Pauline Walber
3520 W. Outer Drive
Detroit, MI 48221

RE: Walber Construction Company v. U. S.
Court of Appeals for the Federal Circuit

Dear Ms. Walber:

Your petition for a writ of certiorari has been returned under separate cover for its failure to comply with this Court's Rules governing either the size or format of either an appeal or a petition for a writ of certiorari.

I would direct your attention to the enclosed Rules as well as the sample petition for certiorari.

Very truly yours,

ALEXANDER L. STEVAS, CLERK

By:

Edward C. Schade
Assistant Clerk

cdd
Enc.

APPENDIX I

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

February 26, 1985

Mrs. Pauline Walber
WALBER CONSTRUCTION COMPANY
3530 West Outer Drive
Detroit, MI 48221

RE: Walber Construction Company v. The United States Court of Appeals for the Federal Circuit

Dear Mrs. Walber:

The jurisdictional statement which you have resubmitted is again being returned. The Court's Rules require that such pleadings be of a certain size. This includes the cover to those pleadings as well as the appendix thereto

Very truly yours,

ALEXANDER L. STEVAS, CLERK

By:

Edward C. Schade
Assistant Clerk

cdd
Enc.

APPENDIX J

84-1764 (3)

Case No. _____

Office-Supreme Court, U.S.
FILED
JAN 3 1985
ALEXANDER L. STEVAS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CAFC No. 84-641

HUDBCA No. 79-421-C40

PAULINE WALBER, etc.

Appellant,

V.

THE UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
SAMUEL PIERCE, Secretary,

Appellee.

APPELLANT'S EXHIBITS

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313=537-7800

Dated: February 9, 1985

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A-Exh. #3	Motion for Adjournment filed with the HUDBCA	43
A-Exh. #4	Letter from Clerk Hutchinson (CAFC) to HUDBCA, misinterpreting Appellant's Claim of Appeal by Trial De Novo to be a Petition for Review, (used form letter)	45

25. Q. Did Brothers Inc. provide a Cost Price List entitled "PRICE LIST (a) AMENDMENT COSTING"?

A. I do not recall if that was the title used at any given time for the regular cost price list. There was only one type of cost price list regularly provided to HUD Contracting and it was for the purpose of providing a guide for amendments to contracts. (emphasis added)

26. Q. For what purpose is the cost price list entitled "COST HANDBOOK HUD UNIT COST LIST -- ENERGY ITEMS", provided by Brothers Inc., used by HUD?

A. I do not know.

19. Q. Why did you fail to inform Plaintiff that as calculated by Brothers Inc. she was entitled to 18% above cost, for overhead and profit, on amendments?

A. It was not the business of a HUD Contracting Officer to inform contractors that they were entitled to anyparticular percentage above cost for overhead and profit. It was rather the business of a contractor to convince the HUD Contracting Officer that the price sought for an amendment item was reasonable as covering its costs plus certain other negotiable monies. A contractor is not "entitled" to any set percentage above cost for overhead and profit. Many variables were used in determining amendment costs. Some of these were whether a tradesman would have to be specially called in or whether the amendment item would be done in conjunction with similar work already scheduled, what the overhead requirements of the contractor were (out of house or out of shop), what the time requiremencs were, as well as many other variables. (emphasis added).

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
Washington, D. C.

Appeals of:	
WALBER CONSTRUCTION CO.	HUDBCA Nos.
Under Contract Nos.	
044-78-4548 (Asbury)	79-421-C40
044-79-5063 (Montrose)	80-445-C2
044-78-4598 (Oak Drive)	80-465-C5

Glenn M. Greenfield, Esquire
Attorney for Appellant
17117 West Nine Mile Road
Suite 145
Southfield, Michigan 48075

Joan Saloschin, Esquire
Office of General Counsel
Department of Housing and
Urban Development
Washington, D.C. 20410

MOTION FOR ADJOURNMENT

NOW COMES Appellant, Walber Construction Company, by and through her attorney, GLENN M. GREENFIELD, and moves this Honorable Court for an adjournment and further states as follows:

1. That this attorney was retained on or about April 14, 1982, by PAULINE WALBER on behalf of WALBER CONSTRUCTION COMPANY.

2. That the Hearing date in the above referenced matter is set for April 28, 1982.

3. That the time frames involved do not adequately afford counsel sufficient time to learn the factual basis of the litigation, adequately research the substantive law involved, and file the appropriate motions.

4. That the failure of the government to produce documents, as ordered by this Honorable Court, has made it difficult, if not impossible, to garner the necessary evidence within the alloted time.

5. That the Appellant will be extremely prejudiced by this Court's failure to grant an adjournment.

WHEREFORE, the Appellant prays that this Honorable Court will grant its requestfor an adjournment to enable counsel for the Appellant to properly prepare for the forthcoming trial.

GLENN M GREENFIELD
Attorney for Appellant
17117 West Nine Mile Road
Suite 145
Southfield, Michigan 48075
Telephone: (313) 559-6721

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson,
Clerk

Telephone 633-6550
Area Code 202

October 31, 1983

Board of Contract Appeals
Dept. of HUD
451 7th Street, S.W.
Wash., DC 20410

Title: Walber Construction Co. vs. the U.S.
Case Number: HUDBCA No. 79-421-C40

Dear Sir:

This is to acknowledge receipt on October 31, 1983 of a petition for review, copy attached, of a decision of your agency.

Upon receipt of the certified record list described in FRAP 17(b), the case will be docketed as provided in CAFC Rule 11(b)(2).

Very truly yours,

George E. Hutchinson

cc: Mr. Cohen
Ms. Walber

A-Exh. #4